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Appendix.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS.

APPEARANCES.

For plaintiff:

Henry W. Sawyer, III
David P. Bruton

(Duane, Morris & Heckscher for applicant for intervention as deft. Pennsylvania Association of Independent Schools)

For defendant:

J. Shane Creamer for David H. Kurtzman, Grace M. Sloan

Semisch & Commons, 408 N. Easton Rd., Willow Grove, Pa. 19090 for Phila. Montgomery Christian Academy

Samuel Rappaport for Akiba Hebrew Academy & Beth Jacob School of Phila.

William B. Ball—Joseph G. Skelly, 127 State St., Harrisburg, Pa. 17101 for Archbishop Wood High School for Girls

James E. Gallagher Jr.—C. Clark Hodgson, Jr., for St. Anthony's Roman Catholic Church School and Ukrainian Catholic Holy Ghost School

F. Raymond Heuges for Germantown Lutheran Acad.

DOCKET ENTRIES.

Aug. 6, 1971. Motion for Summary Judgment and Permanent Injunction, filed.

Aug. 9, 1971. Certified copy of Judgment received from Supreme Court of US that judgment of this court is reversed with costs and cause is remanded for further proceedings in conformity with opinion, further ordered that appellants Lemon et al recover for Kurtzman, the sum of $1,334.80, for their cost, filed. 8/9/71 entered and copies to Judges Troutman, Luongo & Hastie.

Aug. 13, 1971. Defts motion for denial of plffs motion for summary judgment and permanent injunction, filed.

Aug. 13, 1971 Defts motion re framing of injunction, filed.

Aug. 13, 1971. Defts motion to stay further proceedings, filed.

Aug. 16, 1971. Motion of Intervenor Defendant Penna. Assoc. of Independent Schools motion for denial of plffs motion for summary judgment and permanent injunction, filed.

Aug. 16, 1971. Motion of Penna. Assoc. of Independent Schools to stay further proceedings, filed.

Aug. 16, 1971. Motion of Penna. Assoc. of Independent Schools re framing of injunction, filed.

Aug. 16, 1971. Plffs consent to stay of further proceedings, filed.

Aug. 16, 1971. Plffs answer to defts motion re framing of injunction, filed.

Aug. 19, 1971. Order of Court (dated 8/18/71) GRANTING defts motion (#55), and staying all proceedings, etc., pending disposition of appellees petition for rehearing, etc., by the U. S. Supreme Court, filed. (Hastie, Luongo & Troutman, JJ.) (8/19/71 entered and copies mailed).

Aug. 31, 1971. Answer of Penna. Assoc. of Independent Schools to plffs' new matter, filed.

Oct. 6, 1971. Defts motion to modify order for stay of proceedings and to schedule oral argument, filed.

Nov. 26, 1971. Brief in support of defts motion re framing of injunction, filed.

Nov. 30, 1971. Plffs' memorandum in opposition to defts motion re: framing of injunction, filed.

Dec. 1, 1971. Memorandum of law of the Penna. Assoc. of Independent Schools, filed.

Dec. 2, 1971. Plffs memorandum in support of motion for summary judgment and permanent injunction, filed.

Dec. 15, 1971. Argued sur plffs motion for summary judgment and for framing of injunction. C. A. V.

Dec. 28, 1971. Order of Court entering judgment for plaintiffs, with costs, and enjoining defts David H. Kurtzman and Grace Sloan from making payments, etc., to any school which is church related, etc., filed. (12/29/71 entered and copies mailed).

Jan. 6, 1972. Plffs bill of costs, filed.

Jan. 10, 1972. Plaintiffs' notice of appeal to the U. S. Supreme Court from final Order dated 12/28/71, filed.

Jan. 27, 1972. Plffs praecipe for writ of execution, filed. Writ exit.

Jan. 31, 1972. Record mailed to U. S. Supreme Court and notice sent to counsel.

Jan. 31, 1972. Plffs' amended notice of appeal, filed.

Jan. 31, 1972. Plffs' motion for supersedeas, filed.

Feb. 11, 1972. Plff's motion for supersedeas or stay, hearing on C. A. V.

Feb. 22, 1972. Opinion and Order restraining defts David H. Kurtzman (and his successor in office, John Pittinger) and Grace Sloan from making any payments under Act 109 for a period of 90 days, etc., filed. (2/23/72 entered and notice mailed).

Feb. 23, 1972. Appearance of David P. Bruton, Esq. for plffs, filed.

Feb. 28, 1972. Supplemental record mailed to U. S. Supreme Court.

Apr. 17, 1972. List of copies of documents forwarded to this Court by plffs counsel for transmission on appeal to U. S. Supreme Court, filed.

Apr. 18, 1972. Second supplemental record mailed to U. S. Supreme Court.

MOTION FOR SUMMARY JUDGMENT.

(Title Omitted in Printing.)

Now come the plaintiffs, by their attorney, Henry W. Sawyer, III, and move the Court for summary judgment and permanent injunction.

On June 28, 1971 the Supreme Court of the United States ruled that Act 109 was unconstitutional on its face, being in violation of the Establishment Clause of the First Amendment of the United States, on which basis they reversed and remanded.

WHEREFORE, the plaintiffs move the Court to enter judgment for the plaintiffs, with costs.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

ORDER FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION.

(Title Omitted in Printing.)

AND Now, this day of , 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in Lemon v. Kurtzman, No. 89, dated June 28, 1971, it is hereby

ORDERED that judgment be entered in favor of plaintiffs, with costs; and it is hereby

ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, are restrained from making any further payments under or pursuant to Act 109 (Act of June 19, 1968).

J.

DEFENDANTS' MOTION FOR DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION.

(Title Omitted in Printing.)

Defendants David H. Kurtzman, Grace Sloan and Defendant Schools have filed with the Court a Motion to Stay Further Proceedings herein. In the event that the Court should deny that Motion, then, in the alternative, said Defendants respectfully move the Court to deny Plaintiffs' Motion for Summary Judgment and Permanent Injunction. They assign therefor the following reasons:

1. The Supreme Court of the United States, on June 28, 1971, handed down a decision in this case, its opinion reversing the decision of the District Court and remanding the case for further proceedings consistent with this opinion.

2. The Supreme Court in its opinion held Act 109 (Act of June 19, 1968) "unconstitutional" in the limited sense of being unconstitutional in application—that is, as applied to Commonwealth contracts with particular schools possessing the disqualifying characteristics set forth in the opinion.

3. Those disqualifying characteristics may be summarized as follows:

> (1) being "an educational system that is very similar to the one existing in Rhode Island", that is, a system which has schools located near churches, schools in which religious symbols are displayed, religious extra-curricular activities are conducted, a high percent of teachers are nuns or persons in a religious profession, a religious atmosphere is created, supervision is by a bishop, or diocesan superintendent (or

possibly equivalent religious authority), and a handbook (or equivalent document) is employed which calls for the stimulating of religion in the school, and

(2) being controlled by a religious organization, and

(3) having the purpose of propagating and promoting a particular religious faith, and

(4) conducting operations to fulfill the purpose of propagating and promoting a particular religious faith.

4. Whether any of the seven Defendant Schools, or any other nonpublic school with which the Commonwealth has contracted pursuant to Act 109, possesses those characteristics which would render application of the Act to them unconstitutional involves genuine issues of material fact as to each, since the Act speaks only of "nonpublic" schools, and some of the contracting schools are nonsectarian, some are not part of any "educational system", some are Protestant, Jewish or Catholic schools which may have all, only some, or none of the features existing in the Catholic "educational system" found in Rhode Island; some are controlled by religious organizations and some are not; some do not have any purpose of propagating and promoting a religious faith; others have such a purpose but do not conduct their operations in such a way as to fulfill that purpose.

5. It would be totally improper and inequitable for this Court to foreclose to any school which has a contract under the Act its right to be heard and to present evidence with respect to whether or not it possesses the disqualifying characteristics, or to what extent it may possess them. Nothing in the Supreme Court opinion forecloses this right. The granting of Plaintiffs' Motion for Summary Judgment

and Permanent Injunction would constitute a denial of due process of law to every school in the Commonwealth which is not factually disqualified under the Supreme Court's prescription.

6. The pleadings in this case have not been closed. Defendants have not filed an Answer, but they desire to. There has been no trial in this case. No factual record proof is as yet before the Court with respect to whether any of the seven Defendant Schools, or any of the other contracting schools in Pennsylvania, possess the disqualifying characteristics. Such support is obviously not found in the fact that the allegations of the Complaint were admitted, because they were admitted solely for the limited purpose of testing the sufficiency of the Complaint upon Motion to Dismiss for Failure to State a Claim.

7. Where there are disputed issues of material fact a Summary Judgment is improper.

WHEREFORE, the Defendants David H. Kurtzman, Grace Sloan and Defendant Schools respectfully pray the Court to deny the Plaintiffs' Motion for Summary Judgment and Permanent Injunction.

Respectfully submitted,

J. SHANE CREAMER,

J. Shane Creamer,

Attorney General,
Attorney for Defendants, David H. Kurtzman and Grace Sloan.

WILLIAM B. BALL,

William B. Ball,

Attorney for Defendant Schools, Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacob Schools of Philadelphia, St. Anthony's School and Holy Ghost School and Philadelphia Montgomery Christian Academy.

INTERVENOR DEFENDANT'S MOTION FOR DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools, intervenor defendant in the above captioned action, hereby joins in and incorporates by reference herein, Defendants' Motion for Denial of Plaintiffs' Motion for Summary Judgment and Permanent Injunction which has been filed by the defendants David H. Kurtzman, Grace Sloan and the named Defendant Schools.

HENRY T. REATH,
Henry T. Reath,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Defendants
Pennsylvania Association of
Independent Schools.

MOTION RE: FRAMING OF INJUNCTION.

(Title Omitted in Printing.)

Defendants David H. Kurtzman and Grace Sloan and Defendant Schools have filed with the Court a Motion to Stay Further Proceedings and a Motion to Deny Plaintiffs' Motion for Summary Judgment. In the event that the Court should deny both said Motions and in the event that further action of the Court should be in the form of the issuance of an injunction, then, in the alternative, said Defendants move the Court to so frame any injunction as to direct the Defendants, David H. Kurtzman and Grace Sloan, to make the payments under Act 109 (Act of June 19, 1968) which payments the Commonwealth owes to certain nonpublic schools, including Defendant Schools, for services rendered by such schools under contracts for the previous year, 1970-1971. In support of this Motion, Defendants assign the following reasons:

1. Pursuant to the terms of Act 109, the Commonwealth of Pennsylvania, in 1970, entered into valid and binding contracts with certain nonpublic schools, including Defendant Schools, for the sale and purchase of secular educational services under the Act.

2. Prior to the time said contracts had been entered into, this Court had, on November 28, 1969, rendered a decision that the Act was constitutional. The majority opinion further recognized the validity of the contractual relationships. (See opinion of the District Court, 310 F. Supp. 35, 39.)

3. In reliance upon the validity of the Act and in reliance upon the Commonwealth's obligation to reimburse the schools pursuant to the contracts, the schools, including Defendant Schools, fully performed their obligations under the contracts by rendering secular educational services and

actually expending sums of money for teachers' salaries, textbooks and instructional materials. In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same. The Commonwealth of Pennsylvania is indebted to said Schools in the amounts provided for under the respective contracts. The Commonwealth of Pennsylvania is thus indebted to said schools in the amounts provided for under the respective contracts.

4. The applicable law provides that where a contract is entered into under a statute, and that statute is later held invalid, rights and obligations under the contract are not thereby destroyed where at the time of the making of the contract, the statute was presumed valid, where obligations were incurred in good-faith reliance upon the statute, and where there has been full performance of the contract obligations, the invalidating decision will be given prospective, not retroactive application.

WHEREFORE, Defendants David H. Kurtzman and Grace Sloan and Defendant Schools pray this Court to so frame any injunction as to direct the Defendants David H. Kurtzman and Grace Sloan to pay the debts of the Commonwealth to the schools for services rendered but yet unpaid for, pursuant to contracts entered into at a time when the Act was presumed valid and had been held valid by this Court, and to incorporate the following language into any such injunction:

"IT IS ORDERED AND DECREED that the Defendants David H. Kurtzman, as Secretary of Education, and Grace Sloan, as State Treasurer, shall make payments to those schools under contract with the Commonwealth of Pennsylvania for those secular educational services

already rendered during the school year 1970-71, and for which reimbursement has not been made, so that the Commonwealth of Pennsylvania may discharge its contractual debts."

Respectfully submitted,
J. SHANE CREAMER,
J. Shane Creamer,
Attorney General,
Attorney for Defendants David H. Kurtzman and Grace Sloan.

WILLIAM B. BALL,
William B. Ball,
Attorney for Defendant Schools Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacob Schools of Philadelphia, St. Anthony's School and Holy Ghost School, and Philadelphia Montgomery Christian Academy.

MOTION RE: FRAMING OF INJUNCTION.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools, intervenor defendant in the above captioned action, hereby joins in and incorporates by reference herein, Motion Re: Framing of Injunction which has been filed by the defendants David H. Kurtzman, Grace Sloan and the named Defendant Schools.

HENRY T. REATH,
Henry T. Reath,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Defendants
Pennsylvania Association of
Independent Schools.

ANSWER TO DEFENDANTS' MOTION RE FRAMING OF INJUNCTION.

(Title Omitted in Printing.)

Plaintiffs make the following answer to the above Motion:

1. It is denied that any actions taken by the Commonwealth or any other persons pursuant to the terms of Act 109 are valid or binding.

2. Admitted.

3. It is denied that services were performed for the Commonwealth or that any debt exists from the Commonwealth. On the contrary, it is averred that the "contracts" and the alleged "purchase of services" was a fictional contrivance designed to avoid unconstitutionality and that this conclusion is an inherent ingredient of the decision of the Supreme Court of the United States.

4. Insofar as this paragraph is a statement of law, plaintiffs are advised that they need not respond. Insofar as it is a statement of fact as to what the law is, plaintiffs deny that the law is as stated by the defendants.

New Matter.

5. Payment of additional funds under Act 109 is barred by the decision of the United States Supreme Court.

6. Throughout the hearings on the Act, debate in the Legislature, the statement of the governor in signing the Act, and the legal proceedings, the defendants were on notice that the constitutionality of the Act was highly questionable. To the extent that any acts were done or expendi-

tures made in reliance thereon, the parties proceeded at their own risk.

WHEREFORE, plaintiffs pray the Court to enjoin any further payments under Act 109.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

ORDER.

(Title Omitted in Printing.)

AND Now, this 18th day of August, 1971, upon consideration of the motion of defendants for a stay of proceedings pending disposition by the Supreme Court of the United States of the "Petition of Appellees for Rehearing and Supplemental Opinion", and counsel for plaintiffs having filed a consent to "a stay of all proceedings and any and all actions pursuant to Act 109", IT IS ORDERED that the motion is GRANTED and all proceedings and any and all actions pursuant to Act 109 (Act of June 19, 1968) are stayed pending disposition of the aforementioned petition by the Supreme Court of the United States.

WILLIAM H. HASTIE,
Circuit Judge.

ALFRED L. LUONGO,
District Judge.

E. MAC TROUTMAN,
District Judge.

For the Court,
E. MAC TROUTMAN, *J.*

ANSWER OF THE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS TO PLAINTIFFS' NEW MATTER.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools, by its attorneys, hereby responds to Plaintiffs' New Matter as follows:

1. The Pennsylvania Association of Independent Schools denies each and every allegation contained in Plaintiffs' New Matter.

ROBERT L. PRATTER,
Henry T. Reath,
Robert L. Pratter,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for the Pennsylvania Association of Independent Schools.

MOTION OF DEFENDANTS TO MODIFY ORDER FOR STAY OF PROCEEDINGS AND TO SCHEDULE ORAL ARGUMENT.

(Title Omitted in Printing.)

Defendants, by their respective attorneys, hereby move the Court to modify its Order of August 18, 1971 so as to permit the briefing, oral argument and decision on the Defendants' Motion Re: Framing of Injunction. In support thereof, they assign the following reasons:

1. On August 13, 1971, Defendants filed three Motions: a Motion to Stay All Proceedings, a Motion to Deny Plaintiffs' Motion for Summary Judgment, and a Motion Re: Framing of Injunction. Each Motion raised different considerations and questions of law for resolution by this Court.

2. On August 18, 1971, this Court entered an Order staying all proceedings, pending the disposition of a Petition for Rehearing which Defendants had filed in the Supreme Court of the United States.

3. In good-faith reliance upon the fact that Act 109 had been declared constitutional by this Court, nonpublic schools in Pennsylvania, including Defendant Schools, had entered into contracts with the Commonwealth under that Act for the school year, 1970-1971, and at the conclusion of that school year had fully performed all of their obligations thereunder.

4. The applicable law provides that where a contract is entered into under a statute, and that statute is later held invalid, rights and obligations under the contract are not thereby destroyed where at the time of the making of the contract, the statute was presumed valid, where obligations were incurred in good-faith reliance upon the statute, and

where there has been full performance of the contract obligations. The invalidating decision will be given prospective, not retroactive, application.

5. Defendant Schools and other nonpublic schools throughout the Commonwealth which are now legally entitled to be reimbursed under the Act for the school year 1970—1971 are in urgent need of funds. The withholding of payments has created budget deficits, previously unanticipated, which now threaten, or seriously impair, these schools' present and future operations. Some of these schools will in fact be forced to close their doors and to cease performance of their work of educating Pennsylvania children if they do not soon receive the financial aid which they are now entitled.

6. Since August 13, 1971, the need of the schools for these funds has become acute; each day that passes without the use of this money escalates what is already a critical financial crisis. As a result, Defendant Schools request this Court to proceed to determination of the issues raised in its Motion Re: Framing of Injunction.

7. The issue raised by the Motion, namely, whether under equitable principles the Schools shall be paid for services rendered for the academic year 1970-1971, is not before the United States Supreme Court in the Defendants' Petition for Rehearing. Moreover, it is a decision which this Court must make in the first instance regardless of the disposition made by the Supreme Court of Defendant Schools' Petition.

8. The Treasurer of the Commonwealth of Pennsylvania, Defendant Sloan, possesses funds sufficient to make such payment which are earmarked therefor and can be disbursed to the said nonpublic schools immediately.

WHEREFORE, Defendants respectfully pray the Court to modify its Order of August 18, 1971 insofar as the said Order would preclude this Court's proceeding to a determination of Defendants' Motion Re: Framing of an Injunction and to enter an Order setting the Motion down for argument.

J. SHANE CREAMER,
J. Shane Creamer,

Attorney General of the Commonwealth of Pennsylvania for Defendants Kurtzman and Sloan.

WILLIAM B. BALL,
William B. Ball,

Attorney for Defendants, Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacob Schools of Philadelphia.

C. CLARK HODGSON, JR.
C. Clark Hodgson, Jr.,
JAMES E. GALLAGHER, JR.,
James E. Gallagher, Jr.,

Attorneys for Defendants, St. Anthony's Roman Catholic School, Ukranian Catholic School.

HENRY T. REATH,
Henry T. Reath,

for DUANE MORRIS & HECKSCHER,
Attorneys for the Pennsylvania Association of Independent Schools.

ORDER.

AND NOW, this of Sepetember, 1971, upon consideration of Defendants' Motion to modify this Court's Order of August 18, 1971, it is hereby ORDERED, ADJUDGED and DECREED that the stay of proceedings heretofore entered by this Court on August 18, 1971 be and it is hereby MODIFIED so as to proceed to a determination of Defendants' Motion Re: Framing the Injunction.

IT IS FURTHER ORDERED that argument on the said motion shall be held on the day of , 1971; briefs shall be filed and served by all parties on or before the day of , 1971.

BY THE COURT:

J.

Supreme Court of the United States

No. 71-1470

Alton J. Lemon et al.,

Appellants,

v.

David H. Kurtzman, etc., et al.

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 22, 1972

71-1470

FILED

MAY 10 1972

IN THE

Supreme Court of the United States

October Term, 1971.

No. .

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

Of Counsel:

[illegible] L. Weis,
[illegible] S. Rosen,
American Civil Liberties Union Foundation,
[illegible] Fifth Avenue,
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David P. Brown,
1180 PNB Building,
Philadelphia, Pa. 19107
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC., *Plaintiffs-Appellants,*

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA, *Defendants-Appellees,*

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor Defendant-Appellee.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INTRODUCTION.

Appellants appeal from the final Order of December 28, 1971 by a District Court Panel of three judges of the Eastern District of Pennsylvania, granting plaintiffs-appellants' motion for summary judgment and partially granting plaintiffs-appellants' motion for a permanent injunction on the basis of the decision of the Supreme Court of the United States entered in this action on June 28, 1971, *Lemon v. Kurtzman*, 403 U. S. 602 (1971). The Order of the three-judge court gave only prospective effect to the decision of this Court, in that the permanent injunction restrained disbursements of public funds to religious or church related schools pursuant to Act 109 of the Laws of Pennsylvania, known as the Nonpublic Elementary and Secondary Education Act (hereinafter called "Act 109"), only with respect to services performed or costs incurred subsequent to June 28, 1971. Thus the three-judge court denied, *sub silentio*, appellants' motion for permanent injunction insofar as it sought to restrain reimbursements not yet made under the Act for services performed or costs incurred prior to June 28, 1971. This appeal is taken from the latter aspect of the District Court's order.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW.

The opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

Copies of the Order of said court entered December 28, 1971, and the Opinion and Order subsequently issued by said court on February 22, 1972[1] are attached hereto as an Appendix (1 app-11 app, *infra*).

1. The Order entered on February 22, 1972 is erroneously dated February 22, 1971.

JURISDICTION.

This action, to enjoin enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U. S. C. § 1343 and § 2281, and was heard by a three-judge court pursuant to 28 U. S. C. § 2284. A final decree of the three-judge court granting defendants' motion to dismiss for failure to state a claim was entered on November 28, 1969, and a timely appeal was thereafter taken by appellants to the Supreme Court of the United States. On June 28, 1971, the decision of the three-judge court was reversed by the Supreme Court, and the case was remanded for further proceedings consistent with the opinion of the Supreme Court.

Appellants thereafter moved for summary judgment and a permanent injunction. A final Order without opinion was issued by the three-judge court on December 28, 1971, entering summary judgment for plaintiffs and granting partial injunctive relief as set forth above. Notice of Appeal was filed in the District Court on January 10, 1972, and amended on January 31, 1972 (20 app, 21 app, *infra*). On February 14, 1972, appellants made application to Mr. Justice Brennan for an extension of time for docketing appeal pursuant to Rule 13. By Order dated February 17, 1972, Mr. Justice Brennan extended the time to docket appeal to and including May 10, 1972. On February 22, 1972, an opinion was issued by the three-judge District Court in support of the Order entered on December 28, 1971.

The jurisdiction of the Supreme Court of the United States to review the Order of December 28, 1971 by direct appeal is conferred by 28 U. S. C. § 1253. That jurisdiction is sustained by the decision of this Court in *Briggs v. Elliott*, 342 U. S. 350 (1952).

STATUTE INVOLVED.

The statute of Pennsylvania which was held unconstitutional by this Court in *Lemon v. Kurtzman, supra*, is entitled "Pennsylvania Nonpublic Elementary and Secondary Education Act", Act of June 19, 1968, P. L. —, No. 109, 24 P. S. (Purdon) § 5601, et seq., and is set forth in Appendix A to the majority opinion of the three-judge court in *Lemon v. Kurtzman*, 310 F. Supp. 35, 55-58 (E. D. Pa. 1969). It is also set forth in the Appendix attached hereto (12 app-19 app, *infra*).

The statute provided that a portion of the proceeds of a certain tax on horse racing should, under the direction of the Superintendent of Public Instruction, be used for reimbursement to nonpublic schools for the "purchase" of certain defined educational services. The payments in reimbursement for the cost of these services were to be made after the close of the school year in which the services were provided.

QUESTION PRESENTED.

The three-judge court has held that, although Act 109 was found unconstitutional on its face by this Court, nonetheless public funds now held by the State of Pennsylvania under Act 109 must be paid out to reimburse such schools for services performed or costs incurred prior to June 28, 1971 when the Act was declared unconstitutional.

A single question is presented:

> Does the Supreme Court's decision that Act 109 is unconstitutional on its face prohibit subsequent disbursement of public funds under the Act to religious schools for the costs of "secular educational services" provided by those schools before the Act was held unconstitutional?

STATEMENT.

This appeal results from the continuing efforts of the supporters of state financial aid to religious or church related schools to find some means of evading the constitutional barriers to such aid imposed by the First Amendment. On June 19, 1968, Act 109 of the Laws of Pennsylvania became effective. Within one month, appellants publicly announced their intention to challenge the constitutionality of the Act, and on July 3, 1969, a complaint was filed in this action.

The statutory scheme which was the target of this litigation called for a financial subsidy to nonpublic schools using public funds derived from a special tax. This subsidy was described in the Act as a "reimbursement" to nonpublic schools for the costs of providing certain defined "secular educational services." Reimburseable items included teachers' salaries, textbooks and teaching materials in the subjects of mathematics, modern foreign languages, physical science, and physical education. The statutory method of reimbursement contemplated that nonpublic schools would, in the language of the Act, enter into "contracts" for the "purchase of services". Payments were not to be made, however, until after the school year in which the "services" were provided.

On November 28, 1969, the three-judge District Court ruled, in a 2-1 decision (Hastie, Chief Circuit Judge, dissenting) that the Act was constitutional. Plaintiffs thereafter filed a Notice of Appeal to the United States Supreme Court on December 17, 1969. Not until January 15, 1970, following the filing of this Notice of Appeal from the decision of the three-judge court, did the nonpublic schools renew their "contracts" for reimbursement under the Act for "services" to be rendered during the 1970-71 school year. The Supreme Court noted probable jurisdiction of

the appeal on April 20, 1970, prior to the commencement of the 1970-71 school year.

On June 28, 1971, this Court handed down its decision on the appeal, reversing the District Court and declaring the Act unconstitutional on its face on the ground that it necessarily fostered excessive entanglement between church and state and, in the view of at least three members of the Court, supported the establishment of religion,[2] all in contravention of the First Amendment, *Lemon v. Kurtzman, supra.* The case was remanded for further proceedings consistent with the opinion.

Appellants therefore moved for summary judgment and a permanent injunction. Appellees, after first contending that further pleadings and evidence were required in order to determine whether the statute was unconstitutional as applied, then insisted that the nonpublic schools were still entitled to reimbursement under the unconstitutional Act for costs incurred in the 1970-71 school year, on the ground that the schools had acquired vested "contractual rights" which should not be affected by the decision of the Supreme Court. If appellees' position is sustained, the State of Pennsylvania will be obliged to expend approximately $23 million as a subsidy for the operation of nonpublic schools during the 1970-71 year, although this Court has already concluded that such payments would, on their face, create an entangling relationship between church and state in violation of the First Amendment.

Appellants contended in the court below that the normal rule of retroactivity of judicial decisions should apply here; that the rationale of *Lemon v. Kurtzman, supra,* prohibited the payments in question; that no prior decision of this Court compelled or even suggested that *Lemon v.*

2. See separate opinion of Justice Brennan, 403 U. S. at 658, and concurring opinion of Justices Douglas and Black, 403 U. S. at 637. See also the opinion of the Court, 403 U. S. at 621.

Kurtzman be applied only on a prospective basis; and that extending the limited doctrine of prospectivity to this situation would have potentially profound adverse consequences in the broad area of constitutional adjudication involving expenditures of public funds.

The three-judge court, in its opinion issued February 22, 1972, in support of its Order of December 28, 1971, rejected appellants' arguments. It concluded that the old "Blackstonian" view of absolute retroactivity of judicial decisions is no longer viable; that, as stated by this Court in *Linkletter v. Walker,* 381 U. S. 618, 628 (1965), the current view is that "in appropriate cases the Court may in the interest of justice make the rule prospective"; that the standard for determining whether to allow retrospective application is no different in the area of constitutional adjudication than in any other area of law; and that the decision of this Court in *Lemon v. Kurtzman, supra,* must be examined to determine whether prospective application "would in any way undermine its underlying basis and its rationale and, if not, then [the court must] balance the equities between the parties." 7 app, *infra.*

Applying the foregoing approach, the three-judge court decided that "excessive entanglement" was the exclusive constitutional infirmity articulated by this Court in striking down Act 109, that this doctrine was intended primarily to avoid *future* entanglement and encroachment, and that subsequent reimbursements for costs incurred by nonpublic schools prior to the Supreme Court's decision would not offend the rationale of that ruling. The lower court then turned to a "balancing of the equities" between the parties and determined that a greater hardship would result to appellees if the funds were withheld, than would result to appellants if the funds were expended. Thus, the lower court concluded that the prior decision of this Court should

be limited to a prospective application, notwithstanding the admitted facts that (a) the nonpublic schools did not make arrangements to seek the reimbursements in question under the Act until *after* an appeal challenging the constitutionality of this highly controversial statute had already been filed with the Supreme Court, and (b) the "services" in question were not rendered until this Court had already noted probable jurisdiction of the appeal.

The lower court recognized that there were probable grounds for an appeal by appellants, and granted an injunction pending appeal restraining expenditure by the state of the funds in question for a period of ninety days, in order that appellants could resubmit the question to this Court before the issue was mooted. 10 app-11 app, *infra*.

THE QUESTION IS SUBSTANTIAL.

The Supreme Court should take jurisdiction of this case in order that it may vacate that portion of the Order dated December 28, 1971, which, *sub silentio*, denies appellants' motion for a permanent injunction restraining future payments under Act 109 in reimbursement of costs incurred by religious or church related schools prior to June 28, 1971. The issue upon which review is sought is substantial, for two reasons.

First, appellants assert that the lower court has misinterpreted this Court's decision in *Lemon v. Kurtzman, supra*, in concluding that the decision should have only prospective application to Act 109. The fundamental vice of Act 109, as explained by this Court, is that the statutory scheme cannot be carried out without entangling church and state in myriad ways forbidden by the First Amendment. The Court enumerated some of the specifics of this entanglement: state surveillance would be required to insure that teachers, the cost of whose salaries would be reimbursed in whole or in part by the state, would play a strictly nonideological role; the subject matter of the courses offered for reimbursement under the Act would have to be examined to insure that they did not contain any subject matter expressing religious teachings, or the morals or forms of worship of any sect; and the direct subsidy provided to nonpublic schools under the Act would necessarily require further government controls and review to determine from the records of each nonpublic school that the costs for which reimbursement was sought were secular rather than religious.[3]

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3. Section 3(3) of the Act defines "secular subject" to exclude "any subject matter expressing religious teaching, or the morals or forms of worship of any sect", 14 app, *infra*, and Section 7(a) of the Act subjects the accounts of all nonpublic schools to audit by the Auditor General of Pennsylvania to insure compliance with the statute, 18 app, *infra*.

Contrary to the lower court's view, all of the foregoing considerations apply just as much to future reimbursements of costs already incurred by nonpublic schools as they would apply to future reimbursements for costs not yet incurred. The fact is that the State of Pennsylvania would have to engage in precisely the kind of entangling inquiry and surveillance of religious and church related schools that was explicitly forbidden by this Court in *Lemon v. Kurtzman,* in order now to determine whether and how much each nonpublic school can be reimbursed for costs incurred during 1970-71. In addition, the lower court did not even consider whether the fact that Act 109 violates the establishment clause of the First Amendment as pointed out by the separate and concurring opinions in *Lemon v. Kurtzman,* can be squared with permitting additional disbursements under the Act. It is therefore appellants' position that the lower court has fundamentally misconstrued the decision of this Court in *Lemon v. Kurtzman* and this erroneous interpretation should now be corrected.[4]

The second reason why the question here presented is substantial transcends the immediate confines of this litigation. The decision of the lower court marks a significant deviation from the doctrines which have heretofore guided the Supreme Court in determining when an exception should be made to the normal rule of retroactivity of judicial decisions of unconstitutionality, a rule which in the words of Justice Black, constitutes "one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking . . ." *James v. United States,* 366 U. S. 213, 225 (1960) (dissenting opinion).

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4. Appellants are not contending that nonpublic schools must return funds already disbursed under the Act. Whatever improper entanglements occurred as a result of prior disbursements cannot now be undone, in contrast to constitutional difficulties presented by disbursements not yet made.

Appellants fully realize that there is no absolute rule of retroactivity of judicial decisions. But the exceptions to the rule have been few. The touchstone for these exceptions has been "substantial inequitable results" produced by retroactivity. *Cipriano v. City of Houma*, 395 U. S. 701, 706 (1969). The most common circumstances where prospectivity has been found appropriate are (1) where the Supreme Court has reversed its own prior decisions in the field of criminal procedure, e.g., *Linkletter v. Walker, supra*, which held *Mapp v. Ohio*, 367 U. S. 643 (1961) to have only prospective application; and (2) where statutes authorizing bond issues have been invalidated, raising a question as to whether prior purchasers of the bonds would be forced to forfeit their investment, e.g., *Cipriano v. City of Houma, supra; Douglas v. County of Pike*, 101 U. S. 677 (1879). In other instances, this Court has discussed the question of retroactivity in general terms, while deciding the case on other grounds. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940).

But here the lower court has radically expanded the doctrine of prospectivity to permit further payments pursuant to an unconstitutional statute. Act 109 was not declared void on its face because this Court was overruling its own prior decisions; on the contrary, *Lemon v. Kurtzman* is but the most recent judicial declaration that the First Amendment does not permit public funds to be used to subsidize the operations of religious or church related schools. Nor were the Pennsylvania nonpublic schools unaware, when they made arrangements for reimbursements under Act 109 for the 1970-71 school year, that the Act was under direct constitutional attack. Quite the opposite. Notice of an appeal from a 2-1 decision in the three judge court had already been filed with this Court. Probable jurisdiction had been noted by this Court more than four months prior to the rendering of any "services" for which reimbursement is now sought. Under these circumstances, the

posture of the nonpublic schools is scarcely that of innocent reliance. A more accurate view is that the schools simply gambled on trying to get what they could from the state so long as Act 109 was still on the books.

The lower court has stressed that the interests of justice require a prospective application of *Lemon v. Kurtzman* because the nonpublic schools entered into reimbursement "contracts" with the state and performed services in reliance on these "contracts". Yet the lower court found it unnecessary to pass upon appellants' contention that the term "contract" is a statutory misnomer used merely as window dressing for what is in fact a subsidy. Rather, the court simply concluded that the nonpublic schools justifiably relied on the constitutionality of Act 109 and that the denial of reimbursement for 1970-71 would impose a "substantial burden [on them] which would be difficult for them to meet". 10 app, *infra*.

In so doing, the lower court has resurrected and adopted an argument of appellees that was implicitly rejected out of hand by this Court in *Lemon v. Kurtzman, supra;* i.e., that state aid to parochial schools is justified because their financial situation is desperate. The implication is that the nonpublic schools incurred costs in the expectation of future reimbursement, and that these costs would not have been incurred without that expectation. Passing the question whether such expectation was reasonable in the light of a pending appeal to this Court, appellants contend that this view cannot be accepted unless the entire linguistic scheme of the statute ("contracts" for the "purchase" of "services") is adopted at face value as a description of reality which the courts cannot look behind.

Yet this is precisely what the Supreme Court declined to do in *Lemon v. Kurtzman,*[5] and the reluctance is under-

5. In *Lemon v. Kurtzman, supra,* this Court used quotation marks around the word "contract", and throughout all of the opinions the terms "aid" and "subsidy" are constantly used to describe the statutory payment scheme.

standable. Consider the potential implications in the field of constitutional litigation. Would "contracts" with a state for "services" rendered by "private" segregated schools have to be honored so long as they were entered into prior to a judicial declaration that such a scheme is unconstitutional? What incentive would thereby be given to legislatures seeking devices, however temporary, for avoiding constitutional obligations?[6]

All of the foregoing considerations, appellants submit, demonstrate the substantiality of the question here presented.

Respectfully submitted,

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6. It is noteworthy that the Pennsylvania legislature, within two months after the decision of this Court in *Lemon v. Kurtzman*, passed a new statute calling for a direct state subsidy to all parents whose children attend nonpublic schools. Act 92 of the Pennsylvania General Assembly, August 27, 1971. A three judge court has recently held the statute unconstitutional on its face under the First Amendment. *Lemon v. Sloan*, E. D. Pa., Civ. Action No. 71-2223, April 6, 1972.

Appendix.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ETC., ET AL.

ORDER.

AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemon v. Kurtzman,* dated June 28, 1971, 403 U. S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for

any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Education Act (24 PS § 5601-5609) to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

BY THE COURT,

WILLIAM H. HASTIE,
William H. Hastie, Circuit Judge,
ALFRED L. LUONGO,
Alfred L. Luongo, District Judge,
E. MAC TROUTMAN,
E. Mac Troutman, District Judge.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ET AL.

OPINION AND ORDER.

Pursuant to the decision of the Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), this Court entered summary judgment in favor of plaintiffs and restrained payments to church-related schools under the Nonpublic Elementary and Secondary Education Act, 42 [sic] P. S. §§5601-5609, for services performed or costs incurred subsequent to June 28, 1971.[1] At that time, the issue before

1. On remand from the Supreme Court, we entered the following order:

"AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemon v. Kurtzman*, dated June 28, 1971, 403 U. S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Education Act (24 PS § 5601-5609) to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

BY THE COURT,
s/ William H. Hastie, Circuit Judge
s/ Alfred L. Luongo, District Judge
s/ E. Mac Troutman, District Judge."

the Court was whether church-related schools in Pennsylvania which provided secular educational services to non-public school children during the school year 1970-1971 were entitled to reimbursement for those services rendered, notwithstanding the decision of the Supreme Court in this case. We concluded that the church-related schools were entitled to such reimbursement for the reasons hereinafter stated.

The initial dispute between plaintiffs and defendants concerned the legal standard to be applied in determining this issue. Plaintiffs argued, on the one hand, that once a statute has been declared unconstitutional, it is void *ab initio* and "contracts" which depend upon it for their consideration are void. On the other hand, defendants argued that no such principle of absolute retroactivity exists and the question whether a determination of the unconstitutionality of a statute be retroactively applied must be governed by certain considerations in order to obviate any hardship and injustice. Defendants further argue that applying this standard to the facts of this case, the non-public schools are entitled to reimbursement for the school year 1970-1971.

Plaintiffs espouse the "Blackstonian" view,[2] which was followed by the Supreme Court in *Norton v. Shelby County*, 118 U. S. 425 (1886), wherein the Court held that

2. The Blackstonian view was succinctly summarized in 16 C. J. S. § 101(a) where it was stated:

> ". . . [b]roadly, an unconstitutional statute is void, at all times and its invalidity must be recognized or acknowledged for all purposes, or as applied to any state of facts, and is no law, or not a law, or is a nullity, or of no force or effect, or wholly inoperative. Generally speaking, a decision by a competent tribunal that a statute is unconstitutional has the effect of rendering such statute null and void; the act, in legal contemplation, is as inoperative as though it had never been passed or as if the enactment had never been written, and it is regarded as invalid, or void, from the date of enactment, and not only from the date on which it is judicially declared unconstitutional."

an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed". 118 U. S. at 442. The general rule underwent a gradual erosion, culminating in the 1930s with *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932) and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940).[3] In *Great Northern*, the Court rejected the argument that the Constitution was abridged by the lower court's refusal to apply its ruling retroactively, holding at page 364:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co. v. Flanagan* [263 U. S. 444]) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." (citations omitted)[4]

Similarly, in *Chicot*, the Court asserted that broad statements as to the effect of a determination of unconstitutionality, such as that in *Norton v. Shelby County, supra*, must be taken with qualifications. The Court further stated at page 374:

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3. For a concise history of the evolution of the law on retrospective application, see *Linkletter v. Walker*, 381 U. S. 618, 622-629 (1965).

4. It should be noted that the Pennsylvania courts have rejected an absolute application of the Blackstonian view. See *DeMartino v. Zurich Ins. Co.*, 307 F. Supp. 571, 573 (W. D. Pa. 1969); *Box Office Pictures v. Board of Finance and Revenue*, 402 Pa. 511 (1961); *Buradus v. Gen'l Cement Products Co.*, 159 Pa. Super. 502 (1946), *aff'd.* 256 Pa. 349 (1947).

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Whatever vestige of the "Blackstonian" view of absolute retroactivity remained after *Great Northern* and *Chicot* was ultimately laid to rest by the Supreme Court in *Linkletter v. Walker*, 381 U. S. 618 (1965),[5] wherein the Court held that "the accepted rule today is that in appropriate cases the Court may, in the interest of justice, make the rule prospective". 381 at 628.

Plaintiffs, however, argue that the law does not permit the recognition of the validity of any action taken under a statute which was declared unconstitutional on its face. This contention was aptly answered by the Court in *Linkletter*, which was faced with this identical question at pages 628 and 629:

> "Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of

5. Although *Linkletter* involved a constitutional issue of criminal procedure, it established that this rule applies to both civil and criminal litigation. *Linkletter v. Walker*, 381 U. S. at 627.

retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Carodozo said, 'We think the federal constitution has no voice upon the subject'."

Consequently, no different standard of retrospective application is to be applied in the area of constitutional adjudication than in any other area of law.

In order to determine whether agreements to reimburse church-related schools made prior to the Court's decision in this case may be performed, we must "weigh the merits and demerits in [this] case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629. We must further consider "questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of the statute and of its previous application", *Chicot County Drainage District v. Baxter State Bank, supra,* at 374, in addition to equitable considerations of hardship and injustice. *Great Northern R. Co. v. Sunburst Oil & Refining Co., supra,* at 364. Thus, we must examine the decision of the Supreme Court in this case to determine whether prospective application would in any way undermine its underlying basis and its rationale and, if not, then balance the equities between the parties.

In *Lemon,* the Supreme Court summarized its three-pronged test applicable where statutes are challenged under the Establishment Clause of the First Amendment:

> "First, the statute must have a secular legislative purpose; second, its principle [sic] and primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U. S. 236, 243 (1968);

> finally, the statute must not foster 'an excessive government entanglement with religion'. *Walz v. Tax Comm'n*, 397 U. S. 664 (1970)."

As to the initial test, the Court held that the Pennsylvania statute had a secular legislative purpose in that it was designed to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. 403 U. S. at 613. Secondly, the Court found it unnecessary to decide whether the principal or primary effect of the statute advanced or inhibited religion, 403 U. S. at 613-614, thus leaving undisturbed this Court's finding that the Act did not have such effect. 310 F. Supp. at 47. Thereafter, the Court clearly manifested that the basis of its decision was the "excessive entanglement between government and religion" generated by the Act. 403 U. S. at 614. The articulated objectives of the Court's entanglement doctrine are, first, "to prevent, as far as possible, the intrusion of either [government or religion] on the precincts of the other", 403 U. S. at 614, and, secondly, to avoid potential political divisiveness along religious lines. 403 U. S. at 622. With the decision of the Supreme Court in this case and this Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools, the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved. Thus, permitting the allocated funds to be distributed for the 1970-71 school year, would in no way offend the entanglement doctrine as enunciated by the Supreme Court. The Court's emphasis on the "resulting relationship between the government and religious authority", 403 U. S. 615, indicates that its primary concern was the potential for *future* entanglements and encroachments. Since the potential for any future state intrusion into the reli-

gious domain has been eliminated, reimbursement for expenditures made prior to the Supreme Court's decision would in no way run afoul of that ruling. Similarly, since the funds have already been collected and allocated, there is no possibility of future political division along religious lines. To summarize, we concluded that to permit such payment would not undermine the Supreme Court's decision or foster the entanglement or the political dissension feared by the Court.

As previously mentioned, we must now balance the equities between the parties in order to determine whether any hardship or injustice would result from either a prospective or retrospective application of the Supreme Court's decision. As to the plaintiffs, there is no indication that a ruling that the decision is to be applied retrospectively would result in any hardship or injustice. The state has already collected the funds to be allocated to the non-public schools and plaintiffs' contribution to this fund has been de minimis.

As to the defendants, the State has entered into "contracts"[6] with some 1,181 non-public elementary and secondary schools. In reliance on these "contracts", the non-public schools adjusted their budgets accordingly and performed the services required by them. There is no doubt that such reliance was justified by the presumption of constitutionality which attached to the Act upon its signing into law, *Philadelphia v. Depuy*, 431 Pa. 276 (1968) and, a fortiori, by the decision of this Court, in the first instance, holding the Act constitutional. There is no dispute that to deny the church-related schools any reimbursement for

6. Plaintiffs argue that the term "contracts", as applied to these transactions, is misleading and that the payment of funds is, in fact, a subsidy. In the first instance, this Court rejected this argument, 310 F. Supp. at 39-40. In its opinion, the Supreme Court apparently accepted this interpretation. 403 U. S. at 610. At any rate, whether the reimbursements constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it

their services rendered would impose upon them a substantial burden which would be difficult for them to meet. To avoid this hardship, we concluded the funds allocated to reimburse the non-public schools for services rendered in the school year 1970-1971 may be paid.

Accordingly, our order of December 28, 1971, was issued, entering summary judgment in favor of plaintiffs and restraining payments for services performed and costs incurred for any period subsequent to June 28, 1971.

Before the Court at this time is plaintiffs' motion for supersedeas. Plaintiffs argue that unless the Commonwealth of Pennsylvania is restrained from making payments pursuant to Act 109 for services performed and costs incurred for the school year 1970-1971, the state officials may make the payment, thus mooting the issue and, in essence, denying plaintiffs the right to an effective appeal. Since plaintiffs do not intend to post a supersedeas bond as required by Rule 62(d) F. R. Civ. P., and since plaintiffs are appealing from a final order, in effect, denying them an injunction, restraining payments to church-related schools pursuant to Act 109 for the school year 1970-1971, we have construed this motion for supersedeas as a motion for an "injunction pending appeal" pursuant to Rule 62(c), F. R. Civ. P. In a Rule 62(c) motion, upon a consideration of all the facts, we must ask: "would harm result to either party as a result of the granting or denial of the stay, and were there probable grounds for an appeal to protect rights which might be prejudiced by a refusal to grant the stay?" *Shinholt v. Angle,* 90 F. 2d 297 (5th Cir. 1967). *See also*

6. (Cont'd)

lessen the reliance of the non-public schools on the payments or the subsequent hardship upon them if the payments are not made. Defendants have raised the issue of the standing of plaintiffs to argue that these transactions did not constitute contracts. In so holding, we need not decide this issue.

7 Moore's Federal Practice 1365. We agree with plaintiffs that if the monies were paid by the state, the issue would be mooted, and plaintiffs would be denied their right to appeal. Accordingly, we will restrain and enjoin any payment under Act 109 for a period of 90 days, thus giving plaintiffs the opportunity to resubmit this question to the Supreme Court.

ORDER.

And Now, this 22nd day of February, 1971 [sic], It Is Ordered that the defendants David H. Kurtzman (and his successor in office, John Pittinger), Superintendent of Public Instruction, and Grace Sloan, Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined, for a period of ninety (90) days from the date hereof, from making payments for services performed or costs incurred for any period prior to June 28, 1971, under and pursuant to Act 109, entitled the Non-public Elementary and Secondary Education Act, 24 P. S. §§ 5601-5609, to any school which is church-related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

By THE COURT,

/s/ William H. Hastie,
William H. Hastie,
Circuit Court Judge.

/s/ Alfred L. Luongo,
Alfred L. Luongo,
District Court Judge.

/s/ E. Mac Troutman,
E. Mac Troutman,
District Court Judge.

PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT.

§ *5601. Short title.*

This act shall be known and may be cited as the "Nonpublic Elementary and Secondary Education Act." 1968, June 19, P. L. —, No. 109, § 1.

Title of Act:

An act to promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services from nonpublic schools located within the Commonwealth of Pennsylvania for the benefit of residents of the Commonwealth of Pennsylvania; authorizing the Superintendent of Public Instruction to enter into contracts to carry out the intent and purposes of this act, and to establish such rules and regulations as are necessary; providing for the payment of administrative costs incident to the operation of the act; providing procedures for reimbursement in payment for the rendering of secular educational service; and designating a portion of revenues of the State Harness Racing Fund and of the State Horse Racing Fund as the sources of funds. 1968, June 19, P. L. —, No. 109.

§ *5602. Legislative finding; declaration of policy.*

It is hereby determined and declared as a matter of legislative finding—

(1) That a crisis in elementary and secondary education exists in the Nation and in the Commonwealth involving (i) the new recognition of our intellectual and cultural resources as prime national assets and of the national im-

perative now to spur the maximum educational development of every young American's capacity; (ii) rapidly increasing costs occasioned by the rise in school population, consequent demands for more teachers and facilities, new but costly demands, in the endeavor for excellence, upon education generally; the general impact of inflation upon the economy; and the struggle of the Commonwealth, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern State governmental responsibility;

(2) That nonpublic education in the Commonwealth today, as during past recent decades, bears the burden of educating more than twenty percent of all elementary and secondary school pupils in Pennsylvania; that the requirements of the compulsory school attendance laws of the Commonwealth are fulfilled through nonpublic education;

(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education;

(4) That freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;

(5) That the Commonwealth has the right and freedom, in the fulfillment of its duties, to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian;

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

1968, June 19, P. L. —, No. 109, § 2.

§ *5603. Definitions.*

The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Nonpublic Elementary and Secondary Education Fund" shall mean the fund created by this act.

(2) "Secular educational service" shall mean the providing of instruction in a secular subject.

(3) "Secular subject" shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.

(4) "Nonpublic school" shall mean any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law.

(5) "Purchase secular educational service" shall mean the purchase by the Superintendent of Public Instruction from a nonpublic school, pursuant to contract, of secular educational service at the reasonable cost thereof.

(6) "Reasonable cost" shall mean the actual cost to a nonpublic school of providing a secular educational service and shall be deemed to include solely the cost pertaining thereto of teachers' salaries, textbooks and instructional materials.

1968, June 19, P. L. —, No. 109, § 3.

§ *5604. Nonpublic Elementary and Secondary Education Fund.*

There is hereby created for the special purpose of this act a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science, and physical education, provided, however, that as a condition for payment by the Superintendent of Public Instruction for secular educational service rendered hereunder, the Superintendent of Public Instruction shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification approved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition.

1968, June 19, P. L. —, No. 109, § 4.

§ *5605. Administration.*

The administration of this act shall be under the direction of the Superintendent of Public Instruction, who shall establish rules and regulations pertaining thereto, make contracts of every name and number, and execute all instruments necessary or convenient for the purchase of secular educational service hereunder. All expenses incurred in connection with the administration of this act shall be paid solely out of the Nonpublic Elementary and Secondary Education Fund and no money used for the support of the public schools of the Commonwealth shall be used in connection with the administration of this act.

1968, June 19, P. L. —, No. 109, § 5.

§ *5606. Moneys for Fund.*

(a) Permanent Moneys. Into the Nonpublic Elementary and Secondary Education Fund shall be paid each year:

(1) All proceeds from horse racing up to the first ten million dollars ($10,000,000) realized by the State Horse Racing Fund established by the act of December 11, 1967 (Act No. 331),[1] remaining after, and not required for, payment of all of the items of administrative cost set forth in subsection (b) of section 18 of that act,[2] plus

(2) One-half of all such horse racing proceeds in excess of the sum of ten million dollars ($10,000,000), the remaining half thereof to be paid into the General Fund.

(b) Temporary Moneys. Until the time that proceeds in the amount of ten million dollars ($10,000,000) shall, in

1. 15 P. S. § 2651 et seq.
2. 15 P. S. § 2668.

a given fiscal year, have been paid into the Nonpublic Elementary and Secondary Education Fund as provided for under subsection (a) of section 6 hereof,[3] three-fourths of the proceeds from harness racing realized by the State Harness Racing Fund established by the act of December 22, 1959 (P. L. 1978), as amended,[4] remaining after and not required for, the payments provided for in subsections (b) and (d) of section 16 of that act,[5] shall be paid into the Nonpublic Elementary and Secondary Education Fund according to the following formula:

(1) The entire three-fourths of the harness racing proceeds for any fiscal year shall be paid into the Nonpublic Elementary and Secondary Education Fund until such year as the horse racing proceeds designated by this section for the said fund are of such amount that, combined with the harness racing proceeds, the sum of ten million dollars ($10,000,000) shall have been realized by the Nonpublic Elementary and Secondary Education Fund.

(2) Proceeds from harness racing shall cease to be paid into the Nonpublic Elementary and Secondary Education Fund for any fiscal year in which proceeds from horse racing, designated by this section for the Nonpublic Elementary and Secondary Education Fund, shall equal ten million dollars ($10,000,000).

Moneys in the Nonpublic Elementary and Secondary Education Fund are hereby appropriated to the Department of Public Instruction to be used by the Superintendent of Public Instruction solely for the purchase of secular educational service hereunder and administrative expenses pertaining thereto as provided for in section 5 of this act.[6]

1968, June 19, P. L. —, No. 109, § 6.

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3. This section.
4. 15 P. S. § 2601 et seq.
5. 15 P. S. § 2616.
6. Section 5605 of this title.

§ *5607. Reimbursement Procedures.*

(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.

(b) Reimbursements for any fiscal year for the purchase of secular educational service hereunder shall not exceed the total amount of the moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund in that fiscal year.

(c) In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund shall be insufficient to pay the total amount of validated requests hereunder in reimbursement for that year, reimbursements shall be made in that proportion which the total amount of such requests bears to the total amount of moneys in the Nonpublic Elementary and Secondary Education Fund.

(d) The Budget Secretary shall, by July fifteenth of each year, certify to the Superintendent of Public Instruc-

tion, the total amount of money in the Nonpublic Elementary and Secondary Education Fund.

1968, June 19, P. L. —, No. 109, § 7.

§ *5608. Effective Date.*

This act shall take effect July 1, 1968.

1968, June 19, P. L. —, No. 109, § 8.

§ *5609. Severability.*

If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or [1] more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

1968, June 19, P. L. —, No. 109, § 9.

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1. Enrolled bill reads "of".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.,

Plaintiffs,

v.

DAVID H. KURTZMAN, ETC., ET AL.,

Defendants.

NOTICE OF APPEAL.

Notice is hereby given that plaintiffs in the above-captioned matter, Alton J. Lemon, Priscilla Reardon, Betty J. Worrell, Pennsylvania State Education Association, Pennsylvania Conference National Association for the Advancement of Colored People, Pennsylvania Council of Churches, Pennsylvania Jewish Community Relations Conference, Americans United for Separation of Church and State, and American Civil Liberties Union of Pennsylvania, Inc., appeal to the Supreme Court of the United States from the final Order dated December 28, 1971.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
1100 PNB Building,
Philadelphia, Pa. 19107
Attorney for Appellants.

January 10, 1972.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.,

Plaintiffs,

v.

DAVID H. KURTZMAN, ETC., ET AL.,

Defendants.

AMENDED NOTICE OF APPEAL.

The Notice of Appeal filed on January 10, 1972 is hereby amended to state that the appeal is taken pursuant to 28 U. S. C. 1253.

Henry W. Sawyer, III,
Attorney for Plaintiffs-Appellants.

January 31, 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1470

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellees David H. Kurtzman, *et al.*, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

QUESTION PRESENTED

May Pennsylvania, pursuant to the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968, reimburse religiously affiliated schools for services which they performed under contracts with the Commonwealth during the school term 1970-1971, the contracts having been entered into in good faith reliance upon a determination by the district court that the Act was constitutional, and the schools having rendered instructional services, expended funds, adjusted curriculum and undertaken administrative changes in order to fulfill the requirements of the Act?

STATEMENT

On June 19, 1968, Act 109, authorizing the Secretary of Education to enter into contractual relationships with nonpublic schools for the purchase and sale of secular educational services, became law. The Commonwealth then established an office for administering the Act, promulgated regulations, convoked an Advisory Board of educators to consult as to the Act's operation and commenced entering into contractual relationships with approximately 1181 nonpublic schools throughout the state pursuant to the provisions of the Act.

On July 18, 1968, the Plaintiffs announced to the news media that they were challenging the constitutionality of the Act. However, only on June 3, 1969, a year after the Act had been in operation, did they file their Complaint. Thus the program had already become fully established, Pennsylvania's nonpublic schools having by this time expended funds, adjusted curriculum and undertaken administrative changes in

reliance upon the continuing operation of the Act and for the purpose of receiving its benefits.

Following full briefing and oral argument, the District Court, on November 28, 1969, held the Act to be constitutional. See *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D., Pa. 1969).

After that date, specifically on January 15, 1970, the nonpublic schools formally renewed their contracts with the Commonwealth under Act 109 for the coming school year 1970-1971. Payments to the schools under these contracts were, by the terms of the Act, due in four equal installments beginning on September 1, 1971, as reimbursement for services performed by the schools from September 1, 1970, to the end of the school year in June, 1971. The District Court expressly recognized that the "contracts" to which Act 109 refers were actually contracts as a matter of general law (*id.* at 39), creating obligations both upon the Commonwealth and the schools. The schools, during the 1970-1971 term, rendered a total of 5,186,160 hours of instruction to Pennsylvania children in the subject areas covered by the Act and in performance of their specific contract obligations. They likewise expended considerable sums in administrative costs specially necessitated by their assumption of those obligations. All of this was in specific reliance upon the constitutional validity of the Act.

On June 28, 1971, after the expiration of the 1970-1971 school term, the Supreme Court of the United States, upon appeal from the district court decision, reversed. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). On remand, pursuant to that decision, the District Court entered summary judgment in favor of plaintiffs

(Appellants herein) and restrained payments to church-related schools for services performed or costs incurred subsequent to June 28, 1971, thus (over the plaintiffs' objection) leaving the payments for the school year prior to that date unaffected by the injunction. The plaintiffs filed Notice of Appeal with this Court on January 11, 1972. On February 22, 1972, they secured from the Court below an Order for an Injunction Pending Appeal, enjoining the payments in question for a period of 90 days. This Order was accompanied by an Opinion of the Court, setting forth its reasons for permitting the 1970-1971 payments to be made, as well as its reason for granting the injunction pending appeal. The time for docketing the appeal was extended by Order of Mr. Justice Brennan, until May 10, 1972.

ARGUMENT

The principal arguments which the Appellants raise in their Jurisdictional Statement they also presented to the court below. Unanimously, the three-judge court rejected those arguments in its Opinion, which is hereto attached as Appendix A.

The decision of the District Court is plainly correct, and the Opinion a complete answer to the contentions of Appellants. Appellants nevertheless attack it as erroneous with respect to its conclusions concerning what the Supreme Court held in *Lemon* v. *Kurtzman* and with respect to retroactive application of a decision invalidating a statute.

Appellants contend that Pennsylvania's making of reimbursement payments for the 1970-1971 school year would necessitate "the kind of entangling inquiry and

surveillance of religious and church related schools that was expressly forbidden by this Court in *Lemon* v. *Kurtzman.*" (Jurisdictional Statement, 10). The Court below rejected this argument, properly pointing out that, by the issuance of the permanent injunction, restraining future payments under the Act, "the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved." (App. A-6). The Court reasoned:

> "Since the potential for any future state intrusion into the religious domain has been eliminated, reimbursement for expenditures made prior to the Supreme Court's decision would in no way run afoul of that ruling." *Ibid.*

The Supreme Court, in discussing the question of "entanglement" between government and religion in *Lemon* v. *Kurtzman,* was careful to stress that the term "entanglement" is descriptive of a *relationship,* that "all the circumstances of a particular relationship" must be examined in the inquiry as to whether the relationship is forbidden, and that to determine whether the entanglement is excessive, "the resulting relationship between the government and the religious authority" must be examined. *Id.* at 614, 615.

What "resulting relationship" would be the product of payment of the old debt under the now voided Act? The mere terminating of the relationship created by the Act through payments of the moneys earned certainly cannot be said to bring into prospect any relationship bearing the characteristics which this Court described in *Lemon* as improper—*e.g.,* "comprehensive, discriminating, continuing", "sustained and detailed administrative relationships for enforcement of

statutory or administrative standards", "an intimate and continuing relationship." *Id.* at 619, 621, 622.

The District Court was also correct in its refusal to bar payment of the moneys already earned. While Appellants infer that the contracts in question were merely "window dressing" for a subsidy, it is clear that the arrangements in question are contracts under Pennsylvania law.[1] There can be no doubt that contract rights became vested in the schools at the time the contracts were made. The District Court correctly held that, where rights become vested in reliance on a judicial decision, those rights will not be disturbed upon a subsequent overturning of that decision, especially where hardship would result.

The Appellants prove nothing by their assertion that, when the contracts were entered into, "the Act was under direct constitutional attack." Of course it was. It begs belief, however, to conclude from that that the financially plagued schools—in the face of the District Court decision upholding the Act—should have stopped contracting merely because the Appel-

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[1] Pennsylvania law requires only that the promisor suffer a "trifling inconvenience", to support a binding promise (*Mikos* v. *Kida*, 314 Pa. 561 (1934); *York Metal & Alloys Co.* v. *Cyclops Steel Co.*, 280 Pa. 585 (1924); *Stearns* v. *Targe*, 34 D. & C. 2d 399, 52 Del. Co. 96 (1964). The benefit to the Commonwealth and the detriment to the participating schools is: the Act's requiring the use of non-sectarian books, the testing requirements for their students and the promise to hire teachers possessing the qualifications required for certification by the Commonwealth. Moreover, Pennsylvania courts have repeatedly sustained contracts in which a party rendering services to another voluntarily can enforce an express promise made by the recipient of the services that they shall be paid for if the services are continued. See *e.g.*, *Sutch's Estate*, 201 Pa. 305 (1901); *Currey's Estate*, 26 Pa. Super. 479 (1904); *Pohl's Estate*, 136 Pa. Super. 91 (1939).

lants filed an appeal. Certainly the school's reliance on the validity of the Act would have been well founded absent that decision, merely on the ground that their state legislature, the Pennsylvania Attorney General and the Governor of the Commonwealth had all attested to the constitutionality of the Act. Furthermore, there were two parties to the contracts, the Commonwealth being the other signatory, and the schools could reasonably have concluded that if the Commonwealth could rely upon the statute, so indeed could they.

The lower court's application of the doctrine respecting retroactivity finds ample justification not only in the decisions of this Court (cited in the lower court's Opinion) but also in the decisions of the courts of Pennsylvania. See, *DeMartino* v. *Zurich Insurance Company*, 307 F. Supp. 574 (W.D. Pa., 1969), stating the Pennsylvania rule to be:

> " 'A decision reversing or overruling a prior decision as to the construction of a statute is generally retrospective in its operation and relates back to the enactment of the statute, or to the date of the overruled decision', *unless vested rights are acquired in reliance on the overruled decision* . . . This is the Pennsylvania Rule." *Id.* at 573 (Emphasis supplied).

See also *Buradus* v. *General Cement Products Company*, 159 Pa. Super. 502 (1946), aff'd 256 Pa. 349 (1947); *Ray* v. *Natural Gas Company*, 138 Pa. 576 (1891); *Commonwealth* v. *Garrett*, 425 Pa. 594 (1967).

Clearly this case calls for the application of the equitable doctrine enunciated by the Supreme Court. It is true that, in invoking equitable doctrine, the Court should balance the equities. It thus may weigh

the equities of the Commonwealth of Pennsylvania and its nonpublic schools against the equities of the Appellants in this case, Alton J. Lemon, Priscilla Reardon, Betty J. Worrell and the several Appellant organizations. Appellants fail to demonstrate how the question of payment would remotely affect them. Non-payment would not restore any religious liberty which they claim has been denied to them. Indeed, they would not be enttiled to one cent of the withheld funds. Their lives and liberties would be totally unaffected. They fail to demonstrate how they would actually suffer in any manner if the money were not paid out. In short, it is difficult to understand the motivation of the Appellants in insisting on the denial of the equities which are so plainly now possessed by the schools.

On the other hand, non-payment of the money imposes an extreme burden on the schools, the children enrolled therein and their parents. As pointed out previously, the schools have already expended the money in good-faith reliance upon the statute and in good-faith performance of their obligations. Despite the contention that they made no substantial change in their position in reliance on the Act, the fact is that the schools undertook considerable expense for administrative changes required by the Act. Furthermore, they rendered instructional services which they could not otherwise have provided. To now deprive them of the payment of the debts they are owed would be to work an extreme hardship to those schools, to children, their parents, as well as to education throughout the State.

We respectfully submit that the Appellants present no substantial question for the decision of this Court,

and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 69-1206

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ET AL.

Opinion and Order

Pursuant to the decision of the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court entered summary judgment in favor of plaintiffs and restrained payments to church related schools under the Non-public Elementary and Secondary Education Act, 24 P.S. §§ 5601-5609, for services performed or costs incurred subsequent to June 28, 1971.[1] At that time, the issue before the Court

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[1] On remand from the Supreme Court, we entered the following order:

"AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemond* v. *Kurtzman*, dated June 28, 1971, 403 U.S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Education Act (24 PS § 5601-5609) to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

BY THE COURT,

s/ William H. Hastie, Circuit Judge
s/ Alfred L. Luongo, District Judge
s/ E. Mac Troutman, District Judge."

was whether church-related schools in Pennsylvania which provided secular educational services to non-public school children during the school year 1970-1971 were entitled to reimbursement for those services rendered, notwithstanding the decision of the Supreme Court in this case. We concluded that the church-related schools were entitled to such reimbursement for the reasons hereinafter stated.

The initial dispute between plaintiffs and defendants concerned the legal standard to be applied in determining this issue. Plaintiffs argued, on the one hand, that once a statute has been declared unconstitutional, it is void *ab initio* and "contracts" which depend upon it for their consideration are void. On the other hand, defendants argued that no such principle of absolute retroactivity exists and the question whether a determination of the unconstitutionality of a statute be retroactively applied must be governed by certain considerations in order to obviate any hardship and injustice. Defendants further argue that applying this standard to the facts of this case, the non-public schools are entitled to reimbursement for the school year 1970-1971.

Plaintiffs espouse the "Blackstonian" view,[2] which was followed by the Supreme Court in *Norton* v. *Shelby County*, 118 U.S. 425 (1886), wherein the Court held that an unconstitutional statute "confers no rights; it imposes no duty;

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[2] The Blackstonian view was succinctly summarized in 16 C.J.S. § 101(a) where it was stated:

". . . [b]roadly, an unconstitutional statute is void, at all times and its invalidity must be recognized or acknowledged for all purposes, or as applied to any state of facts, and is no law, or not a law, or is a nullity, or of no force or effect, or wholly inoperative. Generally speaking, a decision by a competent tribunal that a statute is unconstitutional has the effect of rendering such statute null and void; the act, in legal contemplation, is as inoperative as though it had never been passed or as if the enactment had never been written, and it is regarded as invalid, or void, from the date of enactment, and not only from the date on which it is judicially declared unconstitutional."

it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed". 118 U.S. at 442. The general rule underwent a gradual erosion, culminating in the 1930s with *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940).[3] In *Great Northern*, the Court rejected the argument that the Constitution was abridged by the lower court's refusal to apply its ruling retroactively, holding at page 364:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co.* v. *Flanagan* [263 U.S. 444]) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted." (citations omitted)[4]

Similarly, in *Chicot*, the Court asserted that broad statements as to the effect of a determination of unconstitutionality, such as that in *Norton* v. *Shelby County*, *supra*, must be taken with qualifications. The Court further stated at page 374:

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have con-

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[3] For a concise history of the evolution of the law on retrospective application, see *Linkletter* v. *Walker*, 381 U.S. 618, 622-629 (1965).

[4] It should be noted that the Pennsylvania courts have rejected an absolute application of the Blackstonian view. See *DeMartino* v. *Zurich Ins. Co.*, 307 F.Supp. 571, 573 (W.D.Pa.1969); *Box Office Pictures* v. *Board of Finance and Revenue*, 402 Pa. 511 (1961); *Burgess* v. *Gen'l Cement Products Co.*, 159 Pa.Super. 502 (1946), *aff'd* 256 Pa. 349 (1947).

sequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Whatever vestige of the "Blackstonian" view of absolute retroactivity remained after *Great Northern* and *Chicot* was ultimately laid to rest by the Supreme Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965),[5] wherein the Court held that "the accepted rule today is that in appropriate cases the Court may, in the interest of justice, make the rule prospective". 381 at 628.

Plaintiffs, however, argue that the law does not permit the recognition of the validity of any action taken under a statute which was declared unconstitutional on its face. This conention was aptly answered by the Court in *Linkletter*, which was faced with this identical question at pages 628 and 629:

"Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution

[5] Although *Linkletter* involved a constitutional issue of criminal procedure, it established that this rule applies to both civil and criminal litigation. *Linkletter* v. *Walker*, 381 U.S. at 627.

neither prohibits nor requires retrospective effect. As Justice Carodozo said, 'We think the federal constitution has no voice upon the subject'."

Consequently, no different standard of retrospective application is to be applied in the area of constitutional adjudication than in any other area of law.

In order to determine whether agreements to reimburse church-related schools made prior to the Court's decision in this case may be performed, we must "weigh the merits and demerits in [this] case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* at 629. We must further consider "questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of the statute and of its previous application", *Chicot County Drainage District* v. *Baxter State Bank, supra,* at 374, in addition to equitable considerations of hardship and injustice. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co., supra,* at 364. Thus, we must examine the decison of the Supreme Court in this case to determine whether prospective application would in any way undermine its underlying basis and its rationale and, if not, then balance the equities between the parties.

In *Lemon,* the Supreme Court summarized its three-pronged test applicable where statutes are challenged under the Establishment Clause of the First Amendment:

> "First, the statute must have a secular legislative purpose; second, its principle and primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion'. *Walz* v. *Tax Comm'n.,* 397 U.S. 664 (1970).]"

As to the initial test, the Court held that the Pennsylvania statute had a secular legislative purpose in that it was designed to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. 403 U.S. at 613. Secondly, the Court found it unnecessary to decide whether the principal or primary effect of the statute advanced or inhibited religion, 403 U.S. at 613-614, thus leaving undisturbed this Court's finding that the Act did not have such effect. 310 F. Supp. at 47. Thereafter, the Court clearly manifested that the basis of its decision was the "excessive entanglement between government and religion" generated by the Act. 403 U.S. at 614. The articulated objectives of the Court's entanglement doctrine are, first, "to prevent, as far as possible, the intrusion of either [government or religion] on the precincts of the other", 403 U.S. at 614, and, secondly, to avoid potential political divisiveness along religious lines. 403 U.S. at 622. With the decison of the Supreme Court in this case and this Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools, the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved. Thus, permitting the allocated funds to be distributed for the 1970-1971 school year, would in no way offend the entaglement doctrine as enunciated by the Supreme Court. The Court's emphasis on the "resulting relationship between the government and religious authority", 403 U.S. 615, indicates that its primary concern was the potential for *future* entanglements and encroachments. Since the potential for any future state intrusion into the religious domain has been eliminated, reimbursement for expenditures made prior to the Supreme Court's decision would in no way run afoul of that ruling. Similarly, since the funds have already been collected and allocated, there is no possibility of future political division along religious lines. To summarize, we concluded that to permit such

payment would not undermine the Supreme Court's decision or foster the entanglement or the political dissension feared by the Court.

As previously mentioned, we must now balance the equities between the parties in order to determine whether any hardship or injustice would result from either a prospective or retrospective application of the Supreme Court's decision. As to the plaintiffs, there is no indication that a ruling that the decision is to be applied retrospectively would result in any hardship or injustice. The state has already collected the funds to be allocated to the non-public schools and plaintiffs' contribution to this fund has been de minimis.

As to the defendants, the State has entered into "contracts"[6] with some 1,181 non-public elementary and secondary schools. In reliance on these "contracts", the non-public schools adjusted their budgets accordingly and performed the services required by them. There is no doubt that such reliance was justified by the presumption of constitutionality which attached to the Act upon its signing into law, *Philadelphia* v. *Depuy*, 431 Pa. 276 (1968) and, a fortiori, by the decison of this Court, in the first instance, holding the Act constitutional. There is no dispute that to deny the church-related schools any reimbursement for

[6] Plaintiffs argue that the term "contracts", as applied to these transactions, is misleading and that the payment of funds is, in fact, a subsidy. In the first instance, this Court rejected this argument, 310 F. Supp. at 39-40. In its opinion, the Supreme Court apparently accepted this interpretation. 403 U.S. at 610. At any rate, whether the reimbursements constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it lessen the reliance of the non-public schools on the payments or the subsequent hardship upon them if the payments are not made. Defendants have raised the issue of the standing of plaintiffs to argue that these transactions did not constitute contracts. In so holding, we need not decide this issue.

their services rendered would impose upon them a substantial burden which would be difficult for them to meet. To avoid this hardship, we concluded the funds allocated to reimburse the non-public schools for services rendered in the school year 1970-1971 may be paid.

Accordingly, our order of December 28, 1971, was issued, entering summary judgment in favor of plaintiffs and restraining payments for services performed and costs incurred for any period subsequent to June 28, 1971.

Before the Court at this time is plaintiffs' motion for supersedeas. Plaintiffs argue that unless the Commonwealth of Pennsylvania is restrained from making payments pursuant to Act 109 for services performed and costs incurred for the school year 1970-1971, the state officials may make the payment, thus mooting the issue and, in essence, denying plaintiffs the right to an effective appeal. Since plaintiffs do not intend to post a supersedeas bond as required by Rule 62 (d) F.R.Civ.P., and since plaintiffs are appealing from a final order, in effect, denying them an injunction, restraining payments to church-related schools pursuant to Act 109 for the school year 1970-1971, we have construed this motion for supersedeas as a motion for an "injunction pending appeal" pursuant to Rule 62 (c), F.R.Civ. P. In a Rule 62 (c) motion, upon a consideration of all the facts, we must ask: "would harm result to either party as a result of the granting or denial of the stay, and were there probable grounds for an appeal to protect rights which might be prejudiced by a refusal to grant the stay?" *Shinholt* v. *Angle,* 90 F.2d 297 (5th Cir. 1967). *See also* 7 Moore's Federal Practice 1365. We agree with plaintiffs that if the monies were paid by the state, the issue would be mooted, and plaintiffs would be denied their right to appeal. Accordingly, we will restrain and enjoin any payment under Act 109 for a period of 90 days, thus giving plaintiffs the opportunity to resubmit this question to the Supreme Court.

Order

AND NOW, this 22nd day of February, 1972, IT IS ORDERED that the defendants David H. Kurtzman (and his successor in office, John Pittinger), Superintendent of Public Instruction, and Grace Sloan, Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined, for a period of ninety (90) days from the date hereof, from making payments for services performed or costs incurred for any period prior to June 28, 1971, under and pursuant to Act 109, entitled the Non-public Elementary and Secondary Education Act, 24 P.S. §§ 5601-5609, to any school which is church-related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

BY THE COURT,

/s/ WILLIAM H. HASTIE
William H. Hastie,
Circuit Court Judge

/s/ ALFRED L. LUONGO
Alfred L. Luongo,
District Court Judge

/s/ E. MAC TROUTMAN
E. Mac Troutman,
District Court Judge.

No. 71-1470

May 18, 1972 - Motion to affirm of Pennsylvania Assn. of Independent Schools, joining in motion to affirm of Kurtzman, Sloan and named defendant schools filed. NOT PRINTED.

No. 71-1470

May 18, 1972 - Motion to affirm of Pennsylvania
Assn. of Independent Schools, joining in
motion to affirm of Kurtzman, Sloan and nam
defendant schools filed. NOT PRINTED.

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OPINION BELOW.

The opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

The Opinion and Orders of said court are set forth at pages 1 app-11 app of the Appendix to the Jurisdictional Statement.

JURISDICTION.

This action, to enjoin enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U. S. C. § 1343 and § 2281, and was heard by a three-judge District Court of the Eastern District of Pennsylvania, pursuant to 28 U. S. C. § 2284. A final decree of the three-judge court granting defendants-appellees' motion to dismiss for failure to state a claim was entered on November 28, 1969, and a timely appeal was thereafter taken by plaintiffs-appellants to the Supreme Court of the United States. On June 28, 1971, this Court reversed the decision of the three-judge court, and remanded the case for further proceedings consistent with the opinion of this Court.

Appellants thereafter moved for summary judgment and a permanent injunction. A final Order without opinion was issued by the three-judge court on December 28, 1971, entering summary judgment for plaintiffs but granting only partial injunctive relief as set forth hereafter. Notice of Appeal was filed in the District Court by appellants on January 10, 1972, and amended on January 31, 1972. By Order dated February 17, 1972, Mr. Justice Brennan granted appellants' application for an extension of time for docketing appeal, pursuant to Rule 13, until May 10, 1972. On February 22, 1972, an opinion was issued by the three-judge District Court in support of the Order en-

tered on December 28, 1971.[1] The appeal was docketed on May 10, 1972, and this Court noted probable jurisdiction on May 22, 1972.

The jurisdiction of the Supreme Court of the United States to review the Order of December 28, 1971, by direct appeal is conferred by 28 U. S. C. § 1253. That jurisdiction is sustained by the decision of this Court in *Briggs v. Elliott*, 342 U. S. 350 (1952).

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED.

The statute of Pennsylvania which was held unconstitutional by this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) (hereinafter cited as *"Lemon"*), is entitled "Pennsylvania Nonpublic Elementary and Secondary Education Act", Act of June 19, 1968, P. L. —, No. 109, 24 P. S. (Purdon) § 5601, et seq. (hereinafter called "Act 109"), and is set forth in Appendix A to the majority opinion of the three-judge court in *Lemon v. Kurtzman*, 310 F. Supp. 35, 55-58 (E. D. Pa. 1969). It is also set forth at pages 12 app-19 app of the Appendix to the Jurisdictional Statement.

The statute provided that a portion of the proceeds of a certain tax on horse racing should, under the direction of the Superintendant of Public Instruction, be used for "reimbursement" to nonpublic schools for the "purchase" of certain defined "educational services", pursuant to "contracts" between the nonpublic schools and the state. The payments in reimbursement for the cost of these services were to be made after the close of the school year in which the services were provided.

1. The Order entered on February 22, 1972 is erroneously dated February 22, 1971.

The First Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

QUESTION PRESENTED.

The three-judge court has held that, although Act 109 was found unconstitutional on its face by this Court, nonetheless public funds held by the State of Pennsylvania under Act 109 must now be paid out to reimburse nonpublic schools for "services" performed or "costs" incurred prior to June 28, 1971, when the Act was declared unconstitutional.

A single question is presented:

> Does the Supreme Court's decision that Act 109 is unconstitutional on its face prohibit subsequent disbursement of public funds under the Act to sectarian schools for the costs of "secular educational services" provided by those schools before the Act was held unconstitutional?

STATEMENT OF THE CASE.

This appeal results from the continuing efforts of the supporters of state financial aid to religious or church-related schools to find some means of evading the constitutional barriers to such aid imposed by the First Amendment. On June 19, 1968, Act 109 of the Laws of Pennsylvania became effective. Passage of the statute followed a series of hearings before the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania. The purpose of these hearings was stated at the outset by the Chairman of the Committee: "to find out if state funds can be used for aid to nonpublic schools" in view of the fact that "these school systems are in serious financial difficulty."[2] Within one month after passage of Act 109, appellants publicly announced their intention to challenge the constitutionality of this legislation, and on July 3, 1969, a complaint was filed in this action.

The statutory scheme which was the target of this litigation called for a financial subsidy to nonpublic schools using public funds derived from a special tax. As stated by this Court in *Lemon:*

> "The statute authorizes appellee state Superintendent of Public Instruction to 'purchase' specified 'secular educational services' from nonpublic schools. Under the 'contracts' authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting

2. Official transcript, pp. 3-4, opening statement of Chairman Fox, Committee on Basic Education, House of Representatives Hearing of April 3, 1968.

procedures that identify the 'separate' cost of the 'secular educational service'. These accounts are subject to state audit." 403 U. S. at 609-10.

Reimbursement under the statute is limited "solely" to the "secular" subjects of mathematics, modern foreign languages, physical science and physical education. All textbooks and instructional materials used in the program have to be approved by the state. Payments for "services" rendered by nonpublic schools pursuant to the "contracts" authorized by the statute are not to be made until after the school year in which the services were provided.

On November 28, 1969, the three-judge District Court ruled, in a 2-1 decision (Hastie, Chief Circuit Judge, dissenting) that the Act was constitutional. Plaintiffs thereafter filed a Notice of Appeal to this Court on December 17, 1969. As appellees asserted in the court below, it was not until January 15, 1970, following the filing of this Notice of Appeal from the decision of the three-judge court, that the nonpublic schools renewed their "contracts" for reimbursement under the Act for "services" to be rendered during the 1970-71 school year. The Supreme Court noted probable jurisdiction of the appeal on April 20, 1970, prior to the commencement of the 1970-71 school year.

On June 28, 1971, this Court handed down its decision on the appeal, reversing the District Court and declaring the Act unconstitutional on its face. The Court repeatedly characterized the statutory scheme as providing a "direct money subsidy", or "continuing cash subsidy", or "government cash grants" to nonpublic schools, and concluded that Act 109 contravened the First Amendment by necessarily fostering excessive entanglement between church and state and by providing state financial aid directly to

church-related schools.[3] The case was remanded for further proceedings consistent with the opinion of this Court.

Appellants then moved for summary judgment and a permanent injunction restraining any further expenditures of funds under Act 109 (A6-A7). Appellees, after first contending that further pleadings and evidence were required in order to determine whether the statute was unconstitutional as applied (A8-A11), then insisted that even if Act 109 was incapable of constitutional application, the nonpublic schools were still entitled to reimbursement under the unconstitutional Act for costs incurred in the 1970-71 school year, on the ground that the schools had acquired vested "contractual" rights which should not be affected by the decision of this Court (A12-A15). If appellees' position is sustained, the State of Pennsylvania will now be obliged to expend more than $23 million as a further subsidy for the operation of nonpublic schools,[4] although this Court has already concluded that such payments would, on their face, violate the First Amendment.

Appellants contended in the court below that the normal effect given to judicial decisions should apply to bar the payments here in question; that the rationale of *Lemon* dictated such a result; that no prior decision of this Court compelled or even suggested that *Lemon* should not be applied to prohibit payments not yet made by the state; and that extending the limited doctrine of prospectivity to this situation would have potentially profound adverse consequences in the broad area of constitutional adjudication involving expenditures of public funds.

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3. 403 U. S. at 621. See also separate opinion of Justice Brennan, 403 U. S. at 652 and concurring opinion of Justices Douglas and Black, 403 U. S. at 637.

4. According to appellees, the fund in question now approximates $24 million. Appellees Response to Appellants' Application to Mr. Justice Brennan for Extension of Injunction Pending Appeal and Motion for Expedited Consideration of the Appeal, para. 6.

The three-judge court, by its Order of December 28, 1971, rejected appellants' foregoing arguments and, *sub silentio*, denied appellants' motion for permanent injunction insofar as it sought to restrain payments not yet made under the Act for "services" performed or costs incurred prior to June 28, 1971. In its Opinion issued on February 22, 1972, the lower court stated its conclusion that the old "Blackstonian" view of absolute retroactivity of judicial decisions is no longer viable; that, as noted by this Court in *Linkletter v. Walker*, 381 U. S. 618, 628 (1965), the current view is that "in appropriate cases the Court may in the interest of justice make the rule prospective"; that the standard for determining whether to allow retrospective application is no different in the area of constitutional adjudication than in any other area of law; and that the decision of this Court in *Lemon* must be examined to determine whether prospective application "would in any way undermine its underlying basis and its rationale and, if not, then [the court must] balance the equities between the parties." Appendix to Jurisdictional Statement, 7 app.

Applying the foregoing approach, the three-judge court decided that "excessive entanglement" was the exclusive constitutional infirmity articulated by this Court in striking down Act 109; that this doctrine was intended primarily to avoid *future* entanglement and encroachment; and that subsequent reimbursements for costs incurred by nonpublic schools prior to the decision in *Lemon* would not offend the rationale of that ruling. The lower court then turned to a "balancing of the equities" between the parties and determined that a greater hardship would result to appellants if the funds were withheld, than would result to appellees if the funds were expended. Thus, the lower court concluded that the prior mandate of this Court should be limited so as to permit subsequent payments by the state in

respect of sectarian school operations during the 1970-71 school year.

Meanwhile, the proponents of public aid to religious and church-related schools in Pennsylvania have continued to generate new legislation to subsidize those schools as fast as earlier attempts have been invalidated by the courts. Within two months after the decision of this Court in *Lemon*, a new statute was enacted by the Pennsylvania legislature calling for a direct state subsidy to all parents whose children attend nonpublic schools. Act 92 of the Pennsylvania General Assembly, August 27, 1971. A three-judge court for the Eastern District of Pennsylvania concluded, on April 6, 1972, that this statute was unconstitutional on its face under the Establishment clause of the First Amendment. *Lemon v. Sloan*, E. D. Pa., Civ. Action No. 71-2223. This decision is being appealed to this Court, but on May 31, 1972, the Pennsylvania House of Representatives passed a package of legislation providing $48 million in aid to nonpublic schools, including two bills which would grant to nonpublic schools, free of charge, certain "auxiliary services", "instructional materials", "equipment" and textbooks. House Bills Nos. 2151 and 2152, Session of 1972. This legislation was approved by the Pennsylvania Senate on July 1, 1972.

SUMMARY OF ARGUMENT.

The court below has held that the ruling of this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), which declared Pennsylvania Act 109 unconstitutional on its face under the First Amendment, should not be applied so as to bar a *subsequent* subsidy to religious or church-related schools in respect of "services" provided by those schools prior to this Court's ruling in *Lemon, supra.* In so holding, the lower court viewed the issue solely in terms of whether *Lemon* was entitled to "prospective" or "retrospective" effect.

This ruling of the district court is erroneous and should be reversed for the following reasons:

1. The rationale of this Court's decision in *Lemon* requires that *all future* payments under Act 109 be prohibited. Such an application accords no more than normal prospective effect to *Lemon,* without raising any questions of "retroactivity". The State of Pennsylvania cannot pay out any additional subsidies to sectarian schools under the Act without either engaging in the very surveillance and control which was explicitly found unconstitutional by this Court in *Lemon,* or providing a direct cash subsidy to religious schools, without any controls to ensure its use for secular purposes, all in violation of the Establishment clause.

2. In according only limited prospective effect to the ruling in *Lemon,* the lower court made a radical and unwarranted departure from the principles heretofore developed by this Court. Almost without exception, the only circumstances where this Court has authorized limitations on the usual retroactive effect of a judicial ruling are (a) where the rights of innocent bond-holders would be voided and public financing rendered chaotic by giving retroactive

effect to a decision invalidating the statute under which the bonds were sold, or (b), where an overruling decision substantially alters the previously accepted rules for conducting criminal proceedings, thus raising the question whether all previous convictions based on the former rule are to be overturned. None of the considerations justifying these narrow exceptions to the general rule of retroactivity are present here; indeed, all of the relevant facts demonstrate that the schools have no contractual or equitable rights to the subsidy in question.

3. The entire statutory scheme of Act 109 is consistent with a system of subsidies rather than contractual payments. There is no showing that the schools provided any more services for which "reimbursement" was sought than they would have provided without the Act. Accordingly, appellees cannot establish any vested "contractual" rights to further subsidies, assuming that such rights could override the mandate of *Lemon* under any circumstances.

4. Appellees have not demonstrated any justifiable reliance on the constitutionality of Act 109 which would warrant allowing further subsidies under the statute. On the contrary, it was uniformly recognized from the beginning that the constitutionality of the statute was, at the very least, open to question, and an appeal was already filed in this Court before any alleged acts of "reliance" occurred. Under the circumstances, the posture of the schools is scarcely that of innocent reliance; rather it can best be characterized as a deliberate gamble to seek whatever funds could be obtained from the state while Act 109 was still on the books. Having elected to take a chance on winning the prior appeal in this action, appellees are now in the same position as any litigant who chooses to take action on the basis of legal advice that turns out to have been erroneous. Such "reliance" has never been regarded as sufficient

reason for limiting the usual effect of the judicial ruling on the rights and obligations of the parties.

5. The rationale of the ruling below will lend inevitable encouragement to legislative efforts (however well intended) to disburse public funds for parochial school aid, even for a limited time, under statutes of questionable constitutionality. The tendency of the law ought not and need not provide any impetus in this direction. Respect for the judicial process, obedience to judicial decisions, and avoidance of political strife over aid to religious schools will all be promoted by adhering to the mandate of *Lemon*, and denying any further disbursements to sectarian schools under Act 109.

ARGUMENT.

I. The Rule of Law Articulated by This Court in *Lemon v. Kurtzman* Bars All Subsequent Payments to Sectarian Schools Under Act 109.

Appellees and the court below have conceived the question here presented solely in terms of whether a "retroactive" or "prospective" effect should be accorded to this Court's prior decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). The formulation is somewhat misleading, and for this reason the specific question to be decided bears repeating at the outset: Does the ruling in *Lemon*, which struck down Act 109 as unconstitutional on its face, bar *subsequent* subsidy payments under the Act by the state of Pennsylvania to religious and church-related schools, in an amount exceeding $20,000,000?[5]

It is not particularly helpful to seek an answer to this question by characterizing the relief sought by appellants as "retroactive". Unless carefully qualified, the term is more confusing than enlightening. Its use would have been far more appropriate had appellants demanded a *return* to the state of subsidies previously paid out under Act 109 to sectarian schools.[6] But appellants have not taken that position; they have urged only that *subsequent* payments under the unconstitutional act are improper. In a real sense, such an interpretation of this Court's decision in *Lemon* grants to it no more than the usual prospective ef-

5. The total fund collected by the state under the special tax created by Act 109, but not yet paid out to nonpublic schools, approximates $24,000,000. Pupils in religious or church-related schools account for more than 96% of the Pennsylvania nonpublic school population. *Lemon v. Kurtzman, supra*, 403 U. S. at 610.

6. See *Box Office Pictures v. Board of Finance and Revenue*, 402 Pa. 511, 166 A. 2d 656 (1961), cited by the court below, Appendix to Jurisdictional Statement, at 5 app., fn. 4.

fect to which all judicial determinations are customarily entitled, particularly rulings such as this one which uphold fundamental First Amendment rights occupying an acknowledged preferred place[7] in the hierarchy of constitutional values.

The central point is that a prohibition of all subsequent payments under Act 109 is totally harmonious with the articulated basis of the decision in *Lemon*. This Court there held that the scheme of governmental aid contemplated by the Act amounted to a direct cash "subsidy" or "grant" to church-related schools, with accompanying means of state control and surveillance which, though designed to avoid use of public funds for religious purposes, necessarily entangled church and state in myriad ways forbidden by the First Amendment. 403 U. S. at 620-22. The Court therefore concluded that the statute was beyond salvage under any circumstances and that all payments pursuant to the Act were unconstitutional. The case was remanded for further proceedings consistent with the opinion. Appellants accordingly moved for summary judgment and a permanent injunction against all *future* disbursements under the Act, and were surprised—to say the least—at appellees' contention that further aid to religious schools could be provided under the stricken statute without infringing upon the mandate of this Court.

Appellees' position rests upon a fundamental misinterpretation of *Lemon*, which the lower court adopted in justifying its denial of normal prospective effect to the ruling. Appellees insist that the problem of "entanglement" articulated in *Lemon* constitutes the only constitutional infirmity of Act 109, that this doctrine is separate and distinct from (if not in opposition to) the dictates of the Establishment and Free Exercise clauses of the First

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7. *Thomas v. Collins*, 323 U. S. 516, 530 (1945).

Amendment,[8] and that payment of the subsidy in question would not offend the "entanglement" rationale. The lower court found this view persuasive in concluding that:

> "With the decision of the Supreme Court in this case and this [lower] Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools [*sic*—the lower court did not permanently enjoin the future payment here at issue, and the injunction in any event runs only against sectarian schools], the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved." Appendix to Jurisdictional Statement, at 8 app.

The approach taken by appellees and the lower court is defective in several respects. First, appellees have missed the central thrust of the "entanglement" notion by treating it as a standard imported into the First Amendment without relation to the Establishment or Free Exercise clauses. In fact, the concept is rooted in both clauses. It neatly focuses on the virtually insoluble problems raised by attempts to provide substantial financial aid to religious schools without running afoul of the Establishment clause. The very controls which are necessary to preclude use of a governmental subsidy in support of religious objectives only inject the state farther into the affairs of religious institutions at the ultimate risk of interfering with rights under the Free Exercise clause.[9] Thus the concept of "entangle-

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8. See Petition of Appellees for Rehearing and Supplemental Opinion, *Lemon v. Kurtsman*, October Term, 1970, No. 89, at pp. 16-29.

9. A distinguished commentator has adverted to the sometimes conflicting demands of the First Amendment impinging on parochial school aid legislation:

ment" supports the protection of rights guaranteed by *both* clauses of the First Amendment. As Justice Rutledge observed in his eloquent dissent in *Everson v. Board of Education*, 330 U. S. 1, 53 (1946): "The great condition of religious liberty is that it be maintained free from sustenance, as also from interferences by the state."

The assertion that the state of Pennsylvania can dispense another $24 million as a subsidy to nonpublic schools under Act 109, without plunging farther into the thicket of forbidden entanglement, is therefore patently wrong. In fact, this position only impales appellees more securely on the horns of the dilemma that Act 109 was unsuccessfully designed to avoid in the first place. The state is now confronted with requests for subsidy from 1,181 nonpublic schools, in "reimbursement" of costs incurred in providing certain "secular educational services" during the 1970-71 school year. If any intelligent appraisal of these requests is to be made, the state must look into them with some care. Indeed, appellees themselves have previously emphasized to this Court and the court below that, in Pennsylvania's diverse religious community, each sectarian school must be scrutinized separately to determine the exact degree of religious involvement in the administration, curriculum and operation of each institution.[10]

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9. (Cont'd.)

"In a large sense, both of the guarantees of the first amendment—the free exercise and the non-establishment clauses—are directed harmoniously toward these purposes [voluntarism in religious matters, mutual abstention of political and religious institutions, and governmental neutrality between religion and nonreligion], though in the context of specific governmental measures the two guarantees may point in different directions and the purposes themselves may be discordant." Freund, Comment, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1684 (1969).

10. Petition of Appellees for Rehearing and Supplemental Opinion, *Lemon v. Kurtzman*, October Term, 1970, No. 89, at pp. 10-12; Defendants' Motion for Denial of Plaintiffs' Motion for Summary [illegible] and Permanent Injunction, A8-A11.

If the funds now sought by appellees are to be disbursed, the state is presented with a Hobson's choice. Either the state must, in an effort to insure proper use of the subsidy, examine into each school's curriculum content, methods of teaching, and segregation of expenses between "secular" and "religious" activities—thereby engaging in precisely the kind of entangling inquiry and surveillance that was explicitly forbidden by this Court—or else the state must simply turn the funds over blindly to the religious and church-related schools, thus providing a subsidy which may directly support religious practices and teaching, in flagrant contravention of the Establishment clause. As this Court concluded in *Lemon:* "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." 403 U. S. at 619. Payment of the subsidy in question would therefore be equally offensive to the Constitution in either case.

If it be urged that no inquiry or control can now be effectively undertaken by the state because the "costs" in question have already been incurred, the answer is that such inquiry is no less required because it may be more difficult to accomplish. Moreover, this Court has specifically pointed out that, "in particular, the [Pennsylvania] government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." 403 U. S. at 621-22. This power is exercisable only *after* the "costs" involved have been incurred. On the other hand, to the extent that appellees contend that the funds can now be paid over without any scrutiny by the state, they only undercut the very safe-

guards which are necessary to ensure that public moneys are utilized only for secular purposes.

Finally, neither appellees nor the court below have acknowledged that Act 109, in providing a direct subsidy to church-related schools, contravenes the Establishment clause without regard to the additional problems raised by the entangling control provisions of the statute. This Court has already so held, in finding that "the Pennsylvania statute, moreover, has the *further defect* of providing state financial aid directly to church-related schools." 403 U. S. at 621 (emphasis added). Justice Brennan was most specific on this point in his separate opinion in the *Lemon* and *Dicenso* cases and *Tilton v. Richardson,* 403 U. S. 672 (1971): "I do not believe that elimination of these aspects of 'too close a proximity' [i.e., measures of surveillance and control] would save these three statutes." 403 U. S. at 652.[11]

The payment of an additional direct subsidy under the Act is therefore unconstitutional in and of itself without regard to whether the machinery of state controls has been dismantled by this Court's prior ruling. The only possible justification that could be offered for such a payment is that it will be the last one under Act 109. But the First Amendment's prohibitions apply as much to one subsidy as they do to many. From the days of Madison's *Memorial and Remonstrance Against Religious Assessments,* it has al-

11. Act 109 has the additional defect, noted by Justice Brennan, that (unlike the Rhode Island statute in the *Dicenso* case) it does not limit the subsidy to sectarian schools whose average per-pupil expenditure on secular education was less than the state's average:

> "Thus the statute on its face permits use of the state subsidy for the purpose of maintaining or attracting an audience for religious education, and also permits sectarian schools not needing the aid to apply it to exceed the quality of secular education provided in public schools. These features of the Pennsylvania scheme seem to me to invalidate it under the Establishment clause as granting preferences to sectarian schools." 403 U. S. at 653, fn. 11.

ways been a question of principle, not of amount. See *Everson v. Board of Education, supra,* at 40-41 (Rutledge, J., dissenting).

The ultimate conclusion is inescapable: any further payments of subsidies to church-related schools pursuant to Act 109 will necessarily conflict with both the rationale and specific holding of this Court in the prior appeal. If this proposition is correct, the proposed payments should be denied, without further reference to the abstract concept of "retroactivity" which appellees have injected into the case.

II. Further Payments to Sectarian Schools Under Act 109 Cannot Be Justified on the Grounds That the Schools Signed "Contracts" or Rendered "Reimbursable Services" Prior to the Date When the Act Was Declared Unconstitutional.

Appellees and the lower court have sought to legitimize additional payments to church-related schools under Act 109 on the theory that certain events which occurred prior to June 28, 1971—the date of this Court's ruling of unconstitutionality—now require disbursement of the funds in question. The sequence of events should be recalled:

— on November 28, 1969, the lower court ruled 2-1 (over the dissent of Judge Hastie, Chief Circuit Judge) that Act 109 was constitutional;

— on December 17, 1969, appellants filed an appeal to this Court;

— on January 15, 1970, the nonpublic schools executed "contracts" (in the terminology of the Act) calling for reimbursement of "secular educational expenses" to be incurred in the school year commencing in September, 1970;

— on April 20, 1970, this Court noted probable jurisdiction of the appeal;

— on June 15, 1970, a three-judge court of the District of Rhode Island unanimously held that the Rhode Island Salary Supplement Act (providing a system of state aid to parochial schools raising constitutional questions similar to those posed by Act 109) violated the First Amendment, *Dicenso v. Robinson*, 316 F. Supp. 112 (D. R. I. 1970);

— in September, 1970, the nonpublic schools began performing the "secular educational services" to be subsidized under Act 109;

— on June 28, 1971, this Court ruled that Act 109 (and the Rhode Island statute) were unconstitutional;

— on September 1, 1971, there came due under the terms of Act 109 the first of four quarterly installments of payments in respect of "services" provided in the preceding school year.

Given this sequence, appellees and the lower court insist that the ruling in *Lemon* would have to be applied retroactively to prohibit the payment now of a subsidy in respect of the 1970-71 school year. This approach diverts attention away from the focal point of *Lemon*—payment by the state of an unconstitutional subsidy to religious schools—and concentrates instead upon the statutory procedures by which the schools applied for the subsidy. Only in this manner is it possible to speak of a "retroactive" application of *Lemon* invalidating pre-existing arrangements. Appellants have indicated in the preceding section of this brief why this is a distortion of the meaning of *Lemon*. But even if it be assumed that events occurring prior to the decision in *Lemon* might have some bearing on whether additional

funds can be disbursed under Act 109, it is abundantly clear that such a result cannot be justified by the precedents of this Court, or the specific facts of this case.

A. The Precedents of This Court Furnish No Basis for According the Decision in *Lemon* a Limited Prospective Effect.

The lower court purported to base its limitation of the mandate in *Lemon* on the prior decisions of this Court. Appellants contend that those cases, dealing with the issue of when normal retrospective effect should be denied to a judicial ruling, do not support the decision below. On the contrary, the lower court's opinion represents a radical and unwarranted departure from existing precedent.

The normal rule, recognized by the District Court, is that judicial decisions operate retrospectively; that is, they determine legal rights and obligations with respect to events that have already transpired. It could hardly be otherwise, since it is the basic role of courts to decide disputes after they have arisen. Any losing litigant who elected to act on the basis of legal advice that turned out to be erroneous, may claim that the right or status which he unsuccessfully sought to vindicate before the court should be upheld because of his "reliance". It has never been thought that this circumstance—an inevitable consequence of having courts decide specific cases or controversies—justifies a limitation on the usual impact of a judicial ruling.

The classic articulation of the rule of retroactivity, as applied to judicial decisions which declare a statute unconstitutional, was given by this Court in *Norton v. Shelby County*, 118 U. S. 425 at 442 (1886), where Justice Field stated:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

According to the lower court, the rule expressed in *Norton* "underwent a gradual erosion, culminating in the 1930's with *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932) and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940)." Appendix to Jurisdictional Statement, at 5 app. But this assertion is true only in a very limited sense. While the rigid language of 19th century Blackstonian jurisprudence exemplified in *Norton* did give way to the more pragmatic formulations of positivism, the *result* enunciated in *Norton* was not significantly impaired: retroactivity continued to be accorded to judicial decisions almost without exception.

Of course appellants recognize that absolute retrospectivity was never applied with total inflexibility, either before or after *Norton*. In a narrow line of cases where legislation authorizing the issuance of municipal bonds had been declared invalid, it was held that bonds previously issued under the statutes would not be rendered void. *Gelpcke v. Dubuque*, 68 U. S. 175 (1864); *Douglass v. County of Pike*, 101 U. S. 677 (1880); *Taylor v. Ypsilanti*, 105 U. S. 60 (1882); *Cipriano v. City of Houma*, 395 U. S. 701 (1969); *Phoenix v. Kolodziejski*, 399 U. S. 204 (1970). However, the intimation contained in some of the earlier cases, to the effect that a judicial decision could not constitutionally invalidate prior contracts, was definitively rejected in *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924).

Outside this line of authority, the rule of retroactivity was almost invariably honored.[12] The cases cited by the

12. One very limited exception was recognized in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930), where

lower court did not mark any significant retreat from the rule. In *Great Northern R. Co. v. Sunburst Oil & Refining Co., supra,* this Court merely concluded that the Constitution did not *require* a state court to give retroactive effect to an overruling decision.[13] *Chicot County Drainage Dist. v. Baxter State Bank, supra,* was decided on the basis of principles of *res judicata.* The dictum of Chief Justice Hughes quoted by the Court below,[14] was simply to the effect that not *every* decision invalidating a statute should necessarily have the effect of voiding all acts, rights and obligations to which the statute had previously given rise. Appellants do not quarrel with this general proposition.

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12. (Cont'd.)
it was held that an overruling state decision could not be applied retroactively so as to deny a taxpayer any opportunity to challenge the assessment of a state tax. Such a denial was found to be a violation of the Due Process clause of the Fourteenth Amendment.

13. Coupled with *Tidal Oil Co., supra,* this case made it clear that the Constitution is neutral on the subject of retroactivity in the abstract; that is, it neither forbids or compels it. But this not to say that retroactivity has not continued as the prevailing doctrine for reasons of sound judicial policy, or that the import of a particular constitutional ruling cannot by its own logic require that retroactive effect be given. See pp. 12-18, *supra.*

14. "The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, —with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." 308 U. S. at 374, quoted at 6 app., Appendix to Jurisdictional Statement.

The only other significant exception to the rule of retroactivity has been recognized in certain cases involving overruling decisions with potential impact on thousands of prior criminal proceedings. Thus, in *Linkletter v. Walker*, 381 U. S. 618 (1965), relied upon heavily by the court below, it was held that the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U. S. 25 (1949), should not be applied retroactively so as to reopen every prior final criminal conviction in which the *Wolf* rule had been followed. This approach has been adopted with respect to certain other overruling decisions affecting criminal proceedings, e.g., *Tehan v. Shott*, 382 U. S. 406 (1966); *Johnson v. New Jersey*, 384 U. S. 719 (1966); *Stovall v. Denno*, 388 U. S. 293 (1967); *Desist v. United States*, 394 U. S. 244 (1969); *Jenkins v. Delaware*, 395 U. S. 213 (1969). But the practice has by no means been uniform even in this specific field of constitutional adjudication. E.g., *Roberts v. Russell*, 392 U. S. 293 (1968), holding that the rule of *Bruton v. United States*, 391 U. S. 123 (1968) which overturned *Delli Paoli v. United States*, 352 U. S. 232 (1957) was entitled to retrospective effect. Significantly, the Court indicated that reliance by law enforcement officials on the prior decision of this Court in *Delli Paoli* was not a countervailing factor: "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." 392 U. S. at 295.[15]

Thus, whatever can be said about the breadth of the dictum in *Chicot*, or certain of the language in *Linkletter*,

15. Here, of course, there was no prior ruling of this Court upholding the validity of Act 109. While the lower court had sustained the statute in a 2-1 decision over Judge Hastie's powerful dissent, a three-judge district court had on June 15, 1970 (prior to the opening of the 1970-71 school year), unanimously struck down the very similar Rhode Island statute in *Dicenso v. Robinson*, 316 F. Supp. 112 (D. R. I. 1970), a decision that was upheld by this Court in the companion case to *Lemon*.

the fact is that this Court has exercised extreme caution in extending the limitations of prospectivity to cases in areas other than municipal bond litigation and criminal procedure.[16] The language in *Linkletter* has been consistently interpreted and applied by this Court only in other instances of overruling decisions in criminal law. It has never been thought to mean that every civil decision must be scrutinized on a case by case basis to decide which rulings should be prospective.

On the other hand, this Court has recently indicated that the *Chicot* dictum should be limited to the particular facts of that case. In *United States v. Estate of Donnelly*, 397 U. S. 286 (1970), it was held that a judicial decision giving a new interpretation of a section of the Internal Revenue Code of 1939, concerning the place to file a tax lien, was entitled to retrospective effect even though the result was to give priority to a lien on land against the claim of a bona fide purchaser who had acquired the property after checking for tax liens filed elsewhere in conformity with the earlier prevailing judicial interpretation of the statute. The lower court had relied largely on *Chicot* in giving only prospective effect to the later interpretation of the revenue code. This Court reversed, distinguishing *Chicot* and, according to the dissent, narrowly confining the dictum of Chief Justice Hughes to the particular facts involved in *Chicot*. 397 U. S. at 300 (Douglas, J., dissenting).

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16. One other circumstance that might justify a rule of prospectivity is when there is intense statutory compulsion to obey and conform to ordained practice under legislation which is later held invalid. Thus, where a federal taxpayer properly accrues and deducts a state tax on his federal income tax return, the subsequent invalidity of the state tax should not retroactively invalidate the taxpayer's federal return. *J. A. Dougherty's Sons, Inc. v. Commissioner of Internal Revenue*, 121 F. 2d 700 (3d Cir. 1941).

Obviously no such compulsion was exerted upon nonpublic schools to seek subsidies under Act 109.

In his concurring opinion, Justice Harlan rationalized the appropriate exceptions to retroactivity in very narrow terms:

> "The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties have become frozen. . . . [I]n the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life." 397 U. S. at 296.

The reluctance of this Court to broaden the carefully circumscribed range of exceptions to retrospectivity is understandable. As noted above, one unavoidable consequence of having courts decide specific disputes is that the losing party is often in the position of having acted in reliance, to some degree, on a mistaken understanding of his legal position. The fact of such honest reliance—later disappointed in court—does not mean that judicial decisions are given prospective effect only; any resulting loss is simply regarded as part of the uncertainties of life, and a necessary correlative of the judicial process.

This common sense notion rests on sound institutional values. In the words of one perceptive commentator who has expressed reservations about some of the language (if not the result) in *Linkletter*, the doctrine of absolute retroactivity is "despite some real shortcomings, a valuable judicial asset". Mishkin, *The Supreme Court 1964 Term, Forward: The High Court, The Great Writ and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 57 (1965).

The effectiveness of the judicial process ultimately depends upon public acceptance. That acceptance, in turn, is fostered by public confidence that judicial rulings proceed from a rational development of precedent, and not individual predilection.[17] Such confidence is not promoted by the widespread practice of applying judicial rulings prospectively because such an approach to rule making is generally equated with legislation.

Justice Black highlighted this concern with his statement in *James v. United States*, 366 U. S. 213 (1960) that the normal rule of retroactivity constitutes "one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking . . ." *Id.*, at 225 (dissenting opinion).

These considerations go to the core of the integrity of the judicial process, and they are not to be dismissed lightly. Nor have they been. Only the most compelling circumstances have been found appropriate by this Court to limit a judicial ruling to a prospective application. Thus, in the field of municipal bond litigation a rule of prospectivity is justified because public bond financing would become prohibitively expensive, if not impossible, if bond purchasers had to assume the full risk of any future ruling that invalidated the statute or procedure under which the bonds were sold. In the area of criminal procedure, it is hardly necessary to elaborate on the special factors that may mitigate in favor of prospective applications of rulings which overturn previously accepted procedures. Suffice it to point out that these considerations do not remotely apply to the case at bar. Accordingly, there is no reason to refuse giv-

17. "It is easy enough for the sophisticated to show elements of naivete in this view—and no more difficult to scoff at symbols generally. But the fact remains that symbols constitute an important element in any societal structure—and that this symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions." *Id.*, at 62 (footnote omitted).

ing normal effect to the ruling in *Lemon* to prohibit further subsidy payments.

B. The Schools Have No Vested Contractual Right to the Subsidy.

The schools insist that the subsidy applications signed on January 15, 1970, are binding "contracts", executed in reliance on the constitutionality of Act 109; that they have rendered full performance under these "contracts"; and that it would be improper to ignore their alleged rights by refusing to allow reimbursement for the "services" rendered. Although the lower court found it unnecessary to decide this contention (relying instead on a general "balancing of the equities" approach), appellees have continued to press the argument in the apparent belief that their claims are significantly strengthened by calling them "contractual" rather than merely "equitable".[18] Appellants will therefore respond to the contention.

Appellees' position rests upon a false premise: that the entire linguistic scheme of Act 109 (envisoning "contracts" for the "purchase" of "services") must be accepted at face value as a description of reality which the courts cannot look behind. This Court obviously, and quite properly, did not regard itself as so bound in *Lemon*. Throughout the majority, concurring and even dissenting opinions, the statute is described as conferring a "subsidy", "cash grant", "aid" or "support" to the nonpublic schools.[19] These terms do not connote a contractual relationship; they signify a gift, the gratuitous bestowal of a benefit. Con-

18. Appellees concede that there is no constitutional impediment to applying *Lemon* to void pre-existing contractual rights. *Tidal Oil Co. v. Flanagan, supra.* Appellants have argued at pp. 12-18, *supra,* that the rationale of *Lemon* requires denial of any further payments under Act 109, whether or not the relationship between the state and the nonpublic schools is deemed contractual.

19. E.g., 403 U. S. at 610, 620, 621, 624, 652, 653, 654, 665.

sistent with this approach, the Court placed quotation marks around the term "contract" in referring to the statutory vehicle used for providing the subsidy.[20]

It is therefore evident that this Court has already rejected, *sub silentio*, the proposition that the true relationship between the state and each school was that of contracting parties, with each receiving a *quid pro quo*. This rejection was plainly correct. As Judge Hastie pointed out in dissenting from the original lower court decision upholding the constitutionality of Act 109, the nonpublic schools merely submitted, on a form prescribed by the state, an application designating the portions of their curricula for which subsidy was sought. The state then "agreed" to do what the statute already required—that is, to pay the sums mandated by Act 109. The schools did not have to increase their enrollment or change their curricula, or do anything else of benefit to the state. They just applied for aid. One can hardly quarrel with Judge Hastie's conclusion that it is an "artificial characterization" to describe the statutory procedure as "contracting for services". *Lemon v. Kurtzman*, 310 F. Supp. 35, 50 (E. D. Pa. 1969) (dissenting opinion).[21]

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20. 403 U. S. at 609. Intervening defendants-appellees insisted below that this Court, in accepting Act 109's stated purpose of aiding education rather than advancing religion, necessarily also accepted the entire linguistic scheme of the statute, including the term "contract". This is an obvious *non-sequitur*. The purpose of aiding education is equally served by a system of subsidies or contracts. If the substance of the legislative plan is subsidy, it can be recognized as such without denying the secular purpose of the Act.

21. Appellees nevertheless urge that the Pennsylvania courts would regard these subsidy arrangements as "contracts". But the technical notions of "consideration" that might be deemed adequate to support contracts between private parties are scarcely dispositive of whether the legislature, simply by using some magic words in a statute, can transform one kind of legal relationship into another and thereby cloak it from judicial scrutiny. Were it otherwise, the repeated efforts of some legislatures to evade the desegregation man-

In sum, appellees' alleged "contractual rights" are illusory; they do not afford any justification for allowing further payments under Act 109.[22] Without more, this conclusion requires a reversal of the decision below. If the payments are not genuinely contractual, they are manifestly a subsidy, and as argued at pp. 12-18, *infra*, this Court has already ruled in *Lemon* that such a subsidy is, on its face, unconstitutional.

C. The Schools Did Not Innocently Rely to Their Detriment on the Constitutionality of Act 109.

As previously noted, the lower court did not base its decision on a finding that appellees were vested with any contractual rights.[23] Instead, the court baldly asserted—without support of any evidence in the record—that the nonpublic schools had, in reliance on the expected reimbursements, "adjusted their budgets accordingly and per-

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21. (Cont'd.)
dates of this Court by use of subsidized "private" school schemes would have succeeded at least for a time, rather than meeting summary reversal in case after case.

22. Intervenor defendants-appellees insisted below that appellants lacked standing to challenge the validity of the "contracts", as if appellants were seeking to transform this litigation into a contract action. The lower court found it unnecessary to decide this claim since it did not base its decision on a finding of contractual rights, but it suffices to point out that appellants have challenged the constitutionality of Act 109, and as part of that challenge they also have standing to urge an interpretation of the statute and its operative effect.

23. Said the lower court:

"[W]hether the reimbursements constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it lessen the reliance of the non-public schools on the payments or the subsequent hardship upon them if the payments are not made." Appendix to Jurisdictional Statement, at 9 app-10 app, fn. 6.

formed the services required by them." Noting that a denial of the funds would impose a "substantial burden which would be difficult for them to meet", the court allowed the payments to avoid this "hardship". Appendix to Jurisdictional Statement, at 9 app-10 app.

Appellants have previously argued that this amorphous "balancing of the equities" approach goes far beyond the appropriate boundaries of prospective limitation drawn by this Court, and ignores the common understanding of the risks attendant to any litigation. But not only is the District Court's conclusion unprecedented, it is implicitly based on a proposition already rejected out of hand by this Court in *Lemon;* i.e., that state aid to parochial schools can be justified because their financial situation is desperate. Surely it is beyond argument that fiscal need (even assuming the dubious proposition that nonpublic schols are financially worse off than the public schools) is not a factor entitled to any weight whatsoever in evaluating appellees' claim.

Moreover, the lower court has failed to demonstrate that any assumed "reliance" by the nonpublic schools was justified. Apart from the total lack of evidence establishing that the schools provided any "services" during the 1970-71 school year which they would not have furnished anyway without Act 109, it is abundantly clear that the nonpublic schools simply took a chance on obtaining reimbursements for 1970-71 in full awareness that the validity of Act 109 was, at the very least, open to serious question.

Thus, the schools did not even sign reimbursement "contracts" for the 1970-71 school year until a month after an appeal had been filed with this Court from the initial 2-1 decision by the District Court. "Services" were not provided by the schools until several months after this Court had noted probable jurisdiction of the appeal, and well after

June 15, 1970, when the Rhode Island parochial school salary subsidy legislation had been unanimously struck down by a three-judge court in *Dicenso v. Robinson*, 316 F. Supp. 112 (D. R. I. 1970).

In short, Act 109 from its very conception was understood by all interested parties—particularly the parochial schools—as a calculated effort to skirt the shoals of the First Amendment. Appellants do not suggest that the effort to obtain public aid through Act 109 was legally reprehensible in any sense; but no one seeking aid under the statute had any illusions about the inevitability of a legal challenge and the certainty that this Court would ultimately have to decide the issue.

The lower court found that appellees' "reliance" was warranted by the presumption of constitutionality which the Pennsylvania Supreme Court has said attaches to any legislation.[24] But this proposition proves too much. Could a segregated school legitimately "rely" on a statute providing it with state aid? Manifestly, the right to further subsidies under facially unconstitutional legislation cannot rest on such a slender reed.

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24. The case cited by the lower court is *Philadelphia v. Dupuy*, 431 Pa. 276, 244 A. 2d 741 (1968), where a provision of the state gross receipts tax statute was upheld against a challenge of unconstitutionality. The court's opinion is full of such phrases as "one seeking to show a statute unconstitutional must carry a very heavy burden", and "all doubt is to be resolved in favor of sustaining the legislation", and "the taxpayer's burden will be deemed met only if the challenged statute *clearly, palpably* and *plainly* violates the Constitution." 436 Pa. at 279, 244 A. 2d at 743. (emphasis in original).

Whatever the validity of such standards as applied to a challenge of tax legislation, they clearly have no place in litigation seeking to uphold fundamental First Amendment rights. Contrast the language of this Court in *Lemon*:

> "A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U. S. at 612.

Nor could the schools legitimately rely on the initial District Court ruling which upheld, by a 2-1 margin, the constitutionality of Act 109.

> "If the precedent [relied upon] was made in a lower court and has never been passed upon by the highest court of the jurisdiction, reliance upon it is generally held to be similar to reliance upon an uninterpreted statute—the party relying does so at his peril." *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 Yale L. J. 907, 947 (1962).

A fortiori, the schools could not rely with impunity on a lower court ruling which was already on appeal to this Court before any alleged acts of "reliance" occurred, and which (in the face of this Court's prior decisions) was of doubtful merit.

It can be plausibly argued that the power of prospective limitation should be confined to cases involving overruling of precedent—and, indeed, this is by far the most common circumstance in which this Court has applied or even considered the doctrine.[25] But even assuming that the logic of the position cannot be confined quite so narrowly, it surely extends no farther than situations in which a new decision has substantially altered what was previously assumed to have been the law.[26] Notwithstanding the initial ruling of the lower court as to Act 109, no one could, in all candor, regard *Lemon* as fundamentally altering the landscape of the First Amendment as applied to church-state relations. Appellees may have been disappointed at the outcome of *Lemon,* but they can scarcely claim surprise.

In the words of Justice Harlan, the schools simply assumed one of "the risks of life" in seeking a subsidy for

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25. E.g., *Gelpcke v. Dubuque,* 68 U. S. 175 (1864); *Douglass v. County of Pike,* 101 U. S. 677 (1879); *Chicot County Drainage District v. Baxter State Bank, supra; Linkletter v. Walker, supra.*

26. See *Cipriano v. City of Houma,* 395 U. S. 701 (1969).

the 1970-71 school year. *United States v. Estate of Donnelly, supra,* at 296 (concurring opinion). They cannot now make the state underwrite that risk in contravention of this Court's mandate in *Lemon.*

III. A Prospective Limitation on *Lemon* Will Have Potentially Profound Adverse Consequences in Future Constitutional Litigation Concerning Expenditure of Public Funds.

Appellants have argued that the rule of law adopted by the District Court represents a profound expansion of the doctrine of prospective limitation. Neither the precedents of this Court, nor the equities of this case favor the outcome reached below. But there is a larger dimension to the ruling of the lower court which may have impact on a broad class of constitutional adjudication concerning expenditures of public funds. Just as the ultimate reach of the Religion clauses of the First Amendment may be only dimly perceived, so the precise ultimate impact of the ruling below may be difficult to measure in this respect. It is not too much to say, however, that the rationale has potentially ominous consequences extending far beyond the particular circumstances of the case at bar.

The logical import of the opinion below is that whenever a legislative scheme of public expenditures is adopted, private parties can, by undefined acts of "reliance" commit the state to expending public funds, even after a judicial determination that the statute is unconstitutional on its face. However unintentially, this rule of law will inevitably encourage legislative efforts to obligate public funds for popular, if probably unconstitutional, purposes.

This could have unfortunate ramifications, particularly in the area of parochial school aid legislation. It is a proper subject for judicial notice that such legislation has been

passed in many jurisdictions, and that, particularly in Pennsylvania, new statutes have been adopted as soon as prior ones have been struck down. One pernicious result of the ruling below is that it may encourage legislatures to continue seeking ways to get public funds into the religious schools through constitutionally dubious means, in the belief that some subsidy is better than none, and in reliance on the lower court's notion that "contractual" subsidy arrangements entered into before a statute is declared void will safeguard subsequent payment of the subsidy even if only on a temporary basis.

Consider the opportunities that such an approach would have presented to certain legislatures during the days of "massive resistance" to this Court's rulings on school desegregation. One can hardly doubt that various "private" school subsidies would have been enacted with full legislative trappings to emphasize "vested contractual rights". Any rule of law which encourages, however indirectly, such a course of conduct should be avoided. It contributes to the undermining of public confidence in the judicial processes, and tends to set courts and legislatures unnecessarily in stances of opposition to each other.

The potential for political discord and strife which can arise under such circumstances is particularly evident in the area of aid to religious schools. Perhaps the ultimate significance of the ruling in *Lemon* is that it marks a major effort by this Court to withdraw the issue of parochial school aid from the political arena. By drawing definitive limits around permissible uses of public funds in this sensitive area, this Court has sought to avoid political division on religious lines which, as this Court held in *Lemon*, was one of the principal evils against which the First Amendment was intended to protect.

Weighed against these broad considerations of constitutional and judicial policy, there are no countervailing

interests which require permitting the disbursement of further funds under Act 109 as authorized by the court below. The doctrine of prospective limitation is appropriate in certain very limited situations. The case at bar presents no circumstances to warrant its application here.

IV. CONCLUSION.

For all the foregoing reasons, the Order of the lower court dated December 28, 1871 should be reversed insofar as it permits the further disbursement of any funds, under and pursuant to Act 109, to any religious or church-related school.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-1470.

ALTON J. LEMON, PRISCILLA REARDON, KELLY J. WORRELL and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS.

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QUESTIONS PRESENTED.

(1) Did the Court below abuse its discretion in its application of the standards of *Linkletter v. Walker*, 381 U. S. 618 (1965) in determining that this Court's decision and order in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) should be given prospective application only and thereby permit the Commonwealth of Pennsylvania to now pay to all eligible secondary schools, funds, contracted for and spent by these schools for secular educational services in reliance thereon, prior to this Court's decision and order of June 28, 1971? (Answered in the negative by the Court below.)

(2) Does the mere ministerial act of payment now, to non-public schools in Pennsylvania, of funds contracted and educational services rendered prior to this Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) constitute undue entanglement between Church and State so as to undermine the underlying basis of this Court's decision declaring the Pennsylvania Act unconstitutional. (Answered in the negative by the Court below.)

(3) Are not plaintiffs barred from now objecting to payment by the Commonwealth of Pennsylvania for funds contracted to be paid for the school year 1970-1971, where plaintiffs never pressed for injunctive relief to bar payments until after three school years had passed, contracts had been awarded, the schools had rendered services, had been paid for two years, and had made expenditures in reliance that they would likewise be paid for the third year now in issue? (Not answered specifically by the Court below, but by inference, answered yes.)

(4) Do plaintiffs have standing to contend that the Commonwealth did not receive fair value for the educational services rendered of the schools now seeking reimbursement? (Not answered by the Court below.)

STATEMENT OF THE CASE.

Appellants, plaintiffs below, brought this action before a three judge District Court challenging the constitutionality of the "Pennsylvania Nonpublic Elementary and Secondary Education Act", Act of June 19, 1968, P. L. —, No. 109, 24 P. S. § 5601 et seq. ("Act 109"), on June 3, 1969 almost one year after the effective date of Act 109.

The Legislature of Pennsylvania, had determined, "that a crisis in elementary and secondary education exists," in Pennsylvania and the nation;[1] that nonpublic education "through providing instruction in secular subjects, makes an important contribution" to the public welfare of Pennsylvania;[2] and educates more than 20 percent of all elementary and secondary school pupils in Pennsylvania.[3] Through Act 109, the Legislature authorized the Superintendent of Public Instruction to purchase secular education services in mathematics, modern foreign languages, physical science, and physical education from nonpublic schools for the benefit of the nonpublic school children.

Appellants' suit was not brought until after such contracts had been entered into and the services so contracted for had been provided for the school year 1969-1970. Shortly after suit was brought, Appellants abandoned any attempt to seek a preliminary injunction[4] to block payment

1. 24 P. S. § 5602(1) (pp. 12 app, 13 app to Jurisdictional Statement).

2. 24 P. S. § 5602(3) (p. 13 app, Jurisdictional Statement).

3. 24 P. S. § 5602(2) (p. 13 app, Jurisdictional Statement).

4. The complaint filed in this action sought as part of its relief a preliminary injunction against defendants pending the trial of the issues. (Plaintiffs' complaint paragraph 23(3) and see paragraph 17 of plaintiffs' complaint.) This remedy was abandoned by Appellants, who so notified the court by letter of August 28, 1969 from their counsel, Henry W. Sawyer, III, to Judge Troutman, stating:

"In what I thought was a sensible recognition of the practical realities of the situation, I withdrew from any attempt to prevent

for the first year, and on September 2, 1969, according to the terms of Act 109, the state paid the contracting nonpublic schools the first installment for the services performed in 1969-1970.

Appellees, defendants below, filed a motion to dismiss the complaint. The Pennsylvania Association of Independent Schools, an association of 70 accredited independent elementary and secondary schools moved to intervene as a party defendant. This motion was granted as to the motion to dismiss, without prejudice to the Association's application for more general intervention after disposition of the motion to dismiss.

On November 28, 1969, the three judge court, in an opinion by Troutman, J., joined in by Luongo, J., with Judge Hastie dissenting, sustained the motion to dismiss, holding Act 109 constitutional. On December 2, 1969, the second scheduled payment to nonpublic schools took place. Appellants, notwithstanding their obvious intention to appeal the decision, took no steps to prevent this payment.

Relying upon the constitutionality of Act 109, and supported by the holding of the three judge court, the nonpublic schools, prior to January 15, 1970, and in accordance with the procedures and timetable established by the Superintendent of Public Instruction, renewed their contracts for reimbursement under the Act for similar services to be performed during the 1970-1971 school year. The services contracted for were duly performed during the

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4. (Cont'd.)
initial payment to the nonpublic schools scheduled for September 2. According to press reports, checks amounting to $1,212,232.31 will be mailed that day to 1178 private and parochial schools. The next payment, in a somewhat larger amount, is scheduled for December 2."

Notwithstanding Mr. Sawyer's intention expressed in this letter to enjoin the payments scheduled for December 2, 1969, no attempt was made to enjoin any reimbursements under Act 109 until Appellants filed their motion for summary judgment in August, 1971.

1970-1971 school year and the schools, fully believing they would be reimbursed as heretofore, incurred expenses and debts which they would not otherwise have incurred except in reliance on the Commonwealth's promise to pay them (A12, ¶ 3).

On June 28, 1971, this Court, in *Lemon v. Kurtzman*, 403 U. S. 602, declared Act 109 unconstitutional under the Establishment Clause and held that:

¶ Act 109 had the requisite secular legislative purpose—i.e. to aid education—not advance religion. 403 U. S. at 613;

¶ Declined to decide whether the principal or primary effect of Act 109 advanced or inhibited religion, 403 U. S. at 613[5]; thus, in effect leaving undisturbed the holding of the lower court that Act 109 did not have such a primary effect, 310 F. Supp. at 47;

¶ "The cumulative impact of the entire relationship arising under the [statute] . . . involves excessive entanglement between government and religion." 403 U. S. at 614.

The case was remanded for further proceedings consistent with the opinion of this Court.

Appellants then moved for summary judgment and for the first time since Act 109 was enacted, moved for a permanent injunction restraining any further expenditure under Act 109 (A6-A7).[6] Appellees (A12-A14) and inter-

5. This Court thus rejected the contrary arguments vigorously asserted by the Appellants in their brief in the first appeal before this Court. See brief of Appellants, October Term, 1969, No. 1189, pp. 6, 7, 24-31, and addendum. Nevertheless, even though no new or conflicting evidence has been introduced, Appellants again (Appellants' brief at pp. 4, 27-28, 31, 33-35) press on this Court the very arguments rejected in this same case.

6. Pages designated "A" are those printed in the Appellants' Appendix.

venor defendant (A15) filed a motion requesting that any injunction issued be prospective only so as to permit payments under Act 109 for services rendered the previous school year, 1970-1971, prior to this Court's decision. In their motion, the schools stated:

> "*In reliance* upon the validity of the Act and in reliance upon the Commonwealth's obligation to reimburse the schools pursuant to the contracts, the schools, including Defendant Schools, *fully performed* their obligations under the contracts by rendering secular educational services and actually expending sums of money for teachers' salaries, textbooks and instructional materials. *In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same.* The Commonwealth of Pennsylvania is indebted to said Schools in the amounts provided for under the respective contracts. The Commonwealth of Pennsylvania is thus indebted to said schools in the amounts provided for under the respective contracts." (A12-A13, Emphasis added.)

Appellees' Answer failed to deny, or otherwise put at issue, that the schools had so relied on the contracts. Rather, they admitted the fact of reliance, but went on to state that such reliance was foolhardy and that the defendants proceeded at their own risk. See *Plaintiffs' Answer to Defendants' Motion Re: Framing of Injunction*, paragraphs 3 and 6 (A16-A17).

The three judge court carried out the mandate of this Court, and on February 22, 1972, enjoined any payments under Act 109 for services rendered after June 28, 1971, the

date of this Court's opinion. After extensive briefs and oral argument, the lower Court unanimously held that since the schools had relied, with adequate justification, particularly after its decision holding Act 109 constitutional (9 app, Jurisdictional Statement) and since the state had already collected the funds to be allocated (9 app, Jurisdictional Statement), the state would be permitted to pay the money it owed the schools to reimburse them for secular services performed prior to the Supreme Court decision reversing the lower Court (10 app, Jurisdictional Statement).

The court refused to find that reimbursement from the fund for past services rendered constituted advancement of religion. It held that to allow this payment would not contravene this Court's decision in *Lemon v. Kurtzman* since the issuance of the permanent injunction restraining any future payments of state funds to nonpublic schools removed the alleged excessive entanglement between Church and State for which this Court held Act 109 unconstitutional.

SUMMARY OF ARGUMENT.

The decision of the court below should be affirmed:

¶ *First,* the question is whether there was sufficient evidence to justify the lower Court's decision as a sound exercise of its discretion under the facts of this case. Your Honorable Court has made it clear that in the absence of a showing of an abuse of discretion, the decision of the lower court must be affirmed.

- The facts of this case show beyond a doubt that the exercise of sound discretion demands the finding that it is fair, just, and constitutionally permissible to now permit payment to schools who prior to the order of unconstitutionality contracted for, performed services, and incurred expenses they would not otherwise have incurred, in good faith reliance on the fact they would be paid.

¶ *Second,* this Court held Act 109 unconstitutional because it generated undue future entanglement between government and religion. Since the lower court enjoined any disbursements under the Act for services performed after June 28, 1971, entanglement is no longer at issue in this case.

- The lower court was therefore correct—particularly in light of this Court's holding that Act 109 had a lawful secular purpose—in holding that the mere ministerial act of reimbursement now for services performed prior to this Court's holding that Act 109 was unconstitutional, would not advance religion. It is consistent with the opinion of this Court. The lower court therefore

correctly applied the decisions of this Court in permitting reimbursement and recognizing the reliance of the schools upon the constitutionality of the Act.

- Appellants' contentions that Act 109 had the purpose and effect of aiding religion was rejected by this Court in *Lemon v. Kurtzman*, 403 U. S. at 613. Appellants claim that any direct payment to educational institutions violates the Establishment Clause, was rejected by this court in *Tilton v. Richardson*, 403 U. S. 672 (1971).

¶ *Third*, as the lower court found, application of the principles of equity and fairness to the record of this case compels giving prospective effect only to this Court's decision in *Lemon v. Kurtzman*. Appellants, having admitted in their pleading and at oral argument, that the schools relied on the constitutionality of Act 109, cannot now deny such reliance, especially since the record discloses NO new evidence which supports their argument. Moreover, in attempting to argue that the contracts were a sham, Appellants pursue a contention which has previously been rejected by this Court. Valid and binding contracts were entered into by the Commonwealth and the schools.

¶ *Fourth*, there is no basis for Appellants' contention that to permit reimbursement in this instance, would encourage the various state legislatures to resort to a variety of sham devices to aid religion and seek to make payments during the frequently long delays between passage of the legislation and a final ruling on constitutionality by this Court.

- *In the first place,* this Court in rejecting a similar argument advanced by Appellants in their brief to this Court on the first appeal, found specifically that Act 109 had a proper secular purpose—i.e. to aid education—and not to advance religion—and that the Legislature's declaration of purpose must "be accorded appropriate deference". 403 U. S. at 613.

- *Secondly,* any aggrieved person can seek a preliminary injunction to enjoin payment, and if turned down, get immediate appellate review. Appellants also had this right—but elected not to pursue it. Since Appellants never sought to enjoin any payment until after this Court's decision, their dire predictions are exposed as empty rhetoric lacking any foundation whatsoever.

- *Thirdly,* Appellants lulled the schools into believing that they themselves sought only prospective relief from the Court in this matter.

¶ *Fifth,* considering the fundamental importance of our nation's educational facilities, there can be no doubt that the lower court properly balanced the equities in limiting its injunction order to prospective action.

¶ *Finally,* these plaintiffs lack standing to argue that the Commonwealth did not receive fair value under the contracts. This is a question of state, not federal constitutional law.

ARGUMENT.

I. The Court Below Properly Exercised Its Sound Discretion in Limiting Application of This Court's Decision in *Lemon v. Kurtzman* to Future Contracts, Thereby Permitting Reimbursement by the Commonwealth of Pennsylvania to Non-Public Schools of Funds Contracted for Secular Educational Services Rendered, and Expended in Good Faith by Them in Reliance Thereon, Prior to This Court's Opinion That Pennsylvania Act 109 Was Unconstitutional.

Plaintiffs-Appellants, in their brief (see page 21 et seq.) now seem to have abandoned the contention they advanced so strongly in the Court below, that the rigid Blackstonian principle of absolute retroactivity makes an invalidated statute void ab initio absolutely. And obviously they must, in light of this Court's decisions in *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940); *Linkletter v. Walker*, 381 U. S. 618 (1965); *Cipriano v. City of Houma*, 395 U. S. 701 (1969).

Thus all parties now seem to agree that:

¶ **"in appropriate cases the Court may in the interest of justice make the rule prospective"; (see *Linkletter v. Walker, supra*, at page 628).**

¶ **That the decision of this Court in *Lemon* must be examined to determine whether limiting its application prospectively only would in any way undermine its underlying basis and its rationale; and if not, then**

¶ **The Court must balance the equities between the parties.**

Thus the real issue narrows down to whether, under the special facts of this case, the Court below erred in concluding that it would be fair, just, and constitutionally permissible to now permit payment to schools who, prior to the order of unconstitutionality, contracted for, performed services, and incurred expenses they would not otherwise have incurred, and in good faith reliance on the fact they would be paid.

And the question further distilled for Your Honorable Court on this appeal, is: whether there was sufficient evidence to justify the Court's decision as a sound exercise of its discretion under the facts that it found. For, in the absence of a showing of an abuse of discretion, this Court has made it clear over and over again that the action of the lower Court must be affirmed. See *Public Service Commission of Missouri v. Brashear Freight Lines,* 114 F. 2d 1 (8th Cir. 1940), rev'd on other grounds, 312 U. S. 621 (1941), rehearing denied, 313 U. S. 598 (1941); *Delno v. Market St. Ry. Co.,* 124 F. 2d 965 (9th Cir. 1942); *Aetna State Bank v. Altheimer,* 430 F. 2d 750 (7th Cir. 1970).

Far from showing even a simple abuse of discretion, the record and facts in this case reveal overwhelmingly that the exercise of sound discretion compels the decision reached by the court below as the only just and fair result.

To hold otherwise would cause the grossest miscarriage of justice, and would result in denying many millions of dollars to the eligible nonpublic religious schools—who are already in the worst financial crisis of their long and outstanding record of providing quality education to a major segment of our young people. In this regard, we ask the Court to take judicial notice of the serious financial crisis facing nonpublic education, as forcefully revealed in a recently issued report of a blue ribbon non-denominational panel of business and civic leaders in Philadelphia ap-

pointed by John Cardinal Krol, Catholic Archbishop of Philadelphia, and headed by John T. Gurash, Board Chairman of INA Corporation.

For the convenience of the Court, we have annexed copies of the abridged edition of the Gurash report to this brief as Exhibit "B". It speaks in clear and eloquent terms of the critical financial crisis facing an important segment of nonpublic education [7]—i.e. the Catholic Parochial Schools in the Greater Philadelphia Area.

II. Permitting the Commonwealth to Pay the Eligible Schools Now Is in Complete Harmony With This Court's Decision in *Lemon v. Kurtzman*, Since the Ministerial Act of Payment for Secular Educational Services Already Rendered Does Not Involve the Kind of Undue Entanglement Between Church and State Which Impelled This Court to Hold Pennsylvania Act 109 in Violation of the Establishment Clause of the First Amendment.

Permitting the Commonwealth to make payment now to schools for the secular services they rendered under contract, would not in any sense do violence to this Court's decision in *Lemon v. Kurtzman*. That decision struck down the Pennsylvania Act, not because this Court found that the *purpose* or *effect* of the Act was to advance religion,

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7. It is wrong to automatically equate nonpublic religious schools with Catholic schools only. While the Catholic schools have the largest number of pupils attending church schools, there are in Pennsylvania a wide range of other eligible schools seeking reimbursement under Act 109 who are affiliated with, or run by such divergent faiths as the Society of Friends (Quakers), Lutherans, Presbyterians, Methodists, Episcopaleans, Jewish and others. In varying degrees, they too have identical financial problems that would become even more critical if they were now denied the money they have counted on getting under Act 109 for the school year 1970-1971.

but solely on the grounds that the surveillance and other provisions designed to insure that funds were used solely for secular educational purposes, resulted in undue entanglement between Church and State.

That the decision to deny retroactive application would not offend the rationale of *Lemon v. Kurtzman* is made clear by the lower court in its opinion at 8 app where it stated:

> "The articulated objectives of the Court's entanglement doctrine are, first, 'to prevent, as far as possible, the intrusion of either [government or religion] on the precincts of the other', 403 U. S. at 614, and, secondly, to avoid potential political divisiveness along religious lines. 403 U. S. at 622. With the decision of the Supreme Court in this case and this Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools, the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved. Thus, permitting the allocated funds to be distributed for the 1970-71 school year, would in no way offend the entanglement doctrine as enunciated by the Supreme Court."

Plaintiffs-Appellants throughout their brief contend that permitting payment now for educational services rendered under the Act, would constitute impermissible aid to religion in violation of the mandate of this Court. In advancing such an argument, they have completely overlooked the holding of *Lemon v. Kurtzman*, and continue to contend that the primary purpose and effect of Act 109 was to advance religion. It most emphatically was not.

A. This Court Has Already Held That the Pennsylvania Act Had a Secular Purpose to Aid Education and Not Advance Religion.

This Court held, and it is thus the law of this case, that Act 109 has a secular legislative purpose:

> "Inquiry into the legislative purposes of the Pennsylvania . . . [statute] affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the . . . [statute itself] clearly state[s] that it is intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislature meant anything else. *A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in Allen, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.*" 403 U. S. at 613. (Emphasis added.)

For this reason, the not so subtle intimations in Appellants' brief that Act 109 is part of a plot to evade the Constitution and aid religion [8] (e.g. Appellants' brief pp. 4, 31) are not only unsupported [9] and unjustified, but are irrelevant in light of this Court's clear holding that Act 109 evidences a proper secular purpose. Appellants pressed their position upon this Court in the previous appeal,[10] and

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8. The fact that after this Act was held unconstitutional the legislature pursuant to its finding of grave public need tried to find a way within the Constitution to meet this need is irrelevant in light of this Court's holding that Act 109 had a secular purpose.

9. The presence on the record of support of the Pennsylvania Association of Independent Schools for Act 109 conclusively demonstrates the inaccuracy of such an accusation.

10. See Footnote 5.

this Court, as the above quotation demonstrates, refused to make such a finding. Now, without any factual basis or record, appellants again press the question this Court has already decided.

In not deciding whether the principal or primary effect of the statute was one which either advanced or inhibited religion, 403 U. S. at 613,—despite Appellants' contentions to the contrary (Appellants' brief Oct. Term 1969, No. 1189, pp. 6, 7 Addendum)—this Court left undisturbed the finding of the lower court that the Pennsylvania statute did not do so, 310 F. Supp. at 47.

B. Payment of the Money Owing for Services Performed Is Not Unconstitutional as "Excessive Entanglement".

Your Honorable Court in *Lemon* held that the Pennsylvania Act was unconstitutional because of the "excessive entanglement between government and religion" generated by the Act. 403 U. S. at 614. As correctly noted by the court below, the articulated objectives of this Court's entanglement doctrine are first, "to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other," 403 U. S. at 614, and secondly to avoid potential political divisiveness along religious lines. 403 U. S. at 622.

The emphasis of the entanglement doctrine is the potential for *future* entanglement and encroachment of each upon the sphere of the other in a *continuing* relationship where the province of each becomes increasingly less distinct. Thus, this Court, expressing concern regarding a relationship "*pregnant* with danger" stated, "A comprehensive, discriminating, and *continuing* state surveillance will *inevitably* be required to insure that these restrictions are obeyed and the First Amendment otherwise respected,"

403 U. S. at 619 (emphasis added), and warned against the "*continuing* relationship between church and state". 403 U. S. at 622 (emphasis added) and 403 U. S. at 612, 613, 617-619 and 621 [11]

Clearly the injunction awarded by the court below, prohibiting the spending of funds under the Act after the date of this Court's decision, forecloses all possibility of any continuing relationship or encroachment.

The second aspect of this Court's concern with entanglement is political entanglement into the realm of religion:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these . . . statutory programs by the need for *continuing annual appropriations* and the likelihood of larger and larger demands as costs and populations grow." 403 U. S. at 623. (Emphasis added.)

Since the lower court has enjoined payments under the Act after this Court's decision, neither political entanglement nor entanglement between government and religion is any longer an issue as to these payments. The money has been collected. The state is ready to pay, and the funds are precisely allocated from a designated fund.

The schools' applications for contracts have already been reviewed, approved, the contracts let, and services

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11. The Court's opinion in *Lemon* makes patently clear that Act 109 was stricken because of its potential for undue entanglement in the *future*, and not because the Court found any present evidence of an impermissible aid to religion. Thus the Court refers to "dangers" (that religion *will permeate* secular programs) "to a substantial degree". 403 U. S. at 617; and at 618, the Court refers to "the *potential*, if not the actual hazards . . . ."

rendered. All that is required is for the State to satisfy itself, if it hasn't already done so, that the amount of reimbursement is proper—i.e. that the designated number of pupils were in fact enrolled in the schools and in the specific courses for which payment in now sought. This is a pure ministerial act—an administrative matter no more than that involved in *Board of Education v. Allen*, 392 U. S. 236 (1968), or any other law which has been held to be constitutional, withstanding attack under the Establishment Clause.

Furthermore, subsequent appropriations will be not only unnecessary but unavailable because of the injunction of the lower court. This issue thus does not enter the political arena.

C. The Decisions of This Court Do Not Prohibit All Direct Payments to Sectarian Educational Institutions.

Appellants misinterpret *Lemon*, citing it for the proposition that *any* direct payment to church-related schools contravenes the Establishment Clause "without regard to the additional problems raised by the entangling control provisions of the statute", (Brief of Appellants, p. 17), citing Justice Brennan's separate opinion in *Lemon* and *Dicenso*, and *Tilton v. Richardson*, 403 U. S. 672 (1971). Not only is this proposition contrary to the holding of *Lemon*, but it has been specifically rejected by this Court.

Tilton, decided the same day as *Lemon*, upheld as constitutional federal grants for physical facilities to church-related educational institutions. It thus affirmatively established that the mere existence of a direct payment is not

in and of itself sufficient to void an act as contrary to the Establishment Clause of the Constitution.[12]

III. The Lower Court's Determination That a Balancing of Equities and General Principles of Fairness Compelled Giving Prospective Effect Only to This Court's Decision in *Lemon v. Kurtzman* Is Overwhelmingly Supported by the Record.

Appellants, in their zeal to deny to the eligible nonpublic schools reimbursement of moneys which they expended, and would not have expended without the Commonwealth's promise, now belatedly attempt to change the facts and argue:

¶ that there was no reliance by the schools,

¶ that such alleged reliance, if proved, was not justified;

¶ that there were no valid contracts and that the moneys paid constituted a subsidy to which the schools were not entitled.

As developed below, there is no basis in fact for their factual contentions. With respect to the legal arguments advanced, they are the same arguments advanced by Appellants in the original briefs to this Court on the merits and which were specifically rejected or not adopted by the Court as its grounds for voiding the statute under attack.

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12. If Appellants' argument were accepted, the schools must also repay funds already paid under the Act for services rendered during the 1969-1970 school year. In fact, Appellants have never made such an assertion, probably in recognition of the lack of legal precedent to support such a proposition and the extreme harshness of such a proposal.

A. Appellants Have Already Admitted That the Schools Relied Upon the Constitutionality of Act 109 and in Good Faith Made New Expenditures and Incurred Expenses and Debts They Would Not Otherwise Have Incurred Except in Reliance Upon the Commonwealth's Promise to Reimburse Them.

Appellants in the lower court admitted the reliance of the 1,181 schools having contracts with the State for services.[13] Appellees never denied any reliance in their pleadings. In fact, under New Matter, paragraph 6, Appellants admitted that acts were done or expenditures were made in reliance upon the constitutionality of the Act, but alleged that the parties proceeded at their own risk (A16-A17). And as pointed out in the Statement of the Case of this brief at page 5 above, plaintiff appellants admitted that the defendant schools made new expenditures, and incurred expenses and debts they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them.

Appellants base their principal argument of unjustified reliance on the fact that the schools did not sign reimbursement contracts for the 1970-1971 school year until a month after an appeal had been filed in the Supreme Court (Appellants' brief p. 32). However, the date of signing of reimbursement contracts, January 1970, was the date that said action was required by the Superintendent of Public

13. The question of reliance or nonreliance may well be legally irrelevant in these proceedings, for as discussed below, the question here is not whether the schools have a *contractual* right to receive, and the Commonwealth has a *contractual* duty to pay—but only whether there is a First Amendment *constitutional* prohibition that prevents the Commonwealth from making payments. Only in the event of the latter finding, would reliance become germane, i.e. in deciding on the equities, whether the payment should still be allowed. Thus, if the potential evil which this Court was attempting to prohibit is entanglement, the issue of reliance does not even arise.

Instruction as set forth under the Act (24 P. S. § 5605, 16 app., Jurisdictional Statement). While the schools were aware that the decision of the lower court upholding constitutionality was to be challenged, the schools relied, in good faith, as they were entitled to:

¶ Upon the presumption of constitutionality which attaches to any act (see discussion below);

¶ Upon the decision of the lower court which upheld the Act; and

¶ Upon the fact that no action was taken by plaintiffs to enjoin payments for prior years.

There is no doubt that the presumption of constitutionality attached to Act 109 upon its signing into law. *Philadelphia v. Depuy*, 431 Pa. 276, 244 A. 2d 741 (1968). It is the strength of this presumption of constitutionality that demonstrates the weakness in Appellants' argument concerning reliance.

Appellants attempt to show that the schools could not rely on the constitutionality of Act 109 by stating that the Act was understood from the beginning as a calculated effort to skirt the shoals of the First Amendment and the right to further subsidies are no more available to said schools than it would be if a state had enacted state aid to a segregated school (Appellants' brief p. 34). This argument suffers from two fundamental errors.

The first is the finding by the Court in *Lemon* that the statute had a secular legislative purpose:

> "Inquiry into the legislative purposes of the Pennsylvania . . . [statute] affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the . . . [statute itself] clearly [states] that [it is] intended to enhance the quality of the secular education in all schools covered by the com-

pulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference." 403 U. S. at 613.

Moreover, there is no parallelism between state aid to a segregated school and the statute here in question. Long standing decisions by this Court clearly indicate that segregation is against the law of this land, and a state may not give aid thereto. However, as noted by Chief Justice Burger in this case,

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U. S. at 614.

B. The Commonwealth and Contracting Schools Entered Into Valid and Binding Contracts for the 1970-1971 School Year, and Services Have Been Performed Under, and in Reliance on Those Contracts.

The Commonwealth and the schools have consistently maintained that the agreements for the purchase and sale of secular services are valid and binding contractual agreements. Appellants, on the other hand, have argued that the contracts were fictional devices created by the Legislature in an attempt to circumvent the Constitution (Appellants' brief pp. 33-34). However, as discussed above, this argument, previously pressed by Appellants (Appellants' brief, October 1969, No. 1189, at pp. 30-36), was rejected by

the three judge court in its opinion of November 28, 1969, 310 F. Supp. 35, 39-40, and by this Court, 403 U. S. 602, 610 and the three judge court in 1972.

Undaunted by these facts, Appellants now argue that this Court implicitly found that the purchase-of-services device was fiction. In support of this argument, plaintiffs argue that the Supreme Court "invariably" put quotation marks around the word "contract" and that it used the terms "subsidy" or "aid" in the Opinion. See Appellants' brief at pp. 27-29.

Contrary to Appellants' assumption that the use of quotation marks around the word "contract" denotes this Court's disbelief or amusement over the term, it is perfectly clear that this Court was merely quoting from the text of Act 109. See 403 U. S. at 609-610, where the Court liberally quotes from the Act and properly uses quotation marks around many phrases from the Act—"secular educational service", "presented in the curricula of the public schools", "secular", etc.

Surely, if this Court intended to mean that the Legislature was guilty of deception and that the above phrases were hocum, the Court would not have held, as it did, that the Legislature's declaration of purpose was entitled to deference, and that the Act's purpose was not to advance religion. 403 U. S. at 613. Furthermore, in setting forth the history of the Pennsylvania program, the Court stated that the state had entered into contracts, and we may add, without the quotation marks relied on by plaintiffs:

> "The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils—more than 20% of the total number of students in the State." 403 U. S. at 610.

Finally, the Court did not invalidate the Act on the basis of any characterization of the legal relationship be-

tween the Commonwealth and the schools, but solely on the basis of entanglement. Therefore, Appellants' argument attacking the existence of the contracts must be rejected.

C. Appellants Have No Standing to Argue That the Commonwealth Did Not Receive Value Under the Contracts.

The Commonwealth has joined with the schools in asserting that it has a legal obligation to pay the schools for services rendered in the 1970-1971 school year. In so doing, the Commonwealth has indicated that it has received value for the payments. Indeed, the Declaration of Legislative Purpose and Findings, *which have been duly accepted by the Supreme Court,* rests on the finding that the Commonwealth is satisfied and is ready, willing and able to pay out the funds.

Appellants, however, in attempting to block the payment, argue that the Commonwealth has not received a "quid pro quo" under the contracts. See Appellants' brief at pp. 27-28.

Aside from the factual inaccuracy of this charge and the fact, as discussed above, that this Court rejected Appellants' attack on this ground, Appellants lack standing to present this argument. See *Data Processing Service, Inc. v. Camp,* 397 U. S. 150 (1970).

Defendants recognize that Appellants may have standing to attack Act 109 and the payments on constitutional grounds, but this does *not* mean that they have standing to challenge the payments *on any other grounds.*

Thus, Appellants could not argue that the contract between the Commonwealth and any particular school should be set aside because they believe that the school has a mathematics department not to their liking, *or for any*

other reason that does not rise to constitutional proportions. The attack on the value received clearly does not rise to that required level and therefore mandates dismissal of the argument.

Secondly, Appellants cannot raise the quid pro quo argument because they will not be injured in any way by the payment of the funds. Appellants might have had standing to challenge the payment if the Court had held that Act 109 violated plaintiffs' Free Exercise or Equal Protection rights. However, the Court went off *exclusively* on entanglement which does not involve any of the foregoing personal rights of the plaintiffs. Bereft of any evidence of economic or other injury *in fact* from the payment, plaintiffs have no standing. See *Data Processing Service, Inc. v. Camp, supra.*

Finally, even if Appellants could show an injury sufficient to give them standing, another fundamental principle of standing prohibits them from raising the quid pro quo argument—that is, *that a party may not assert rights belonging to another person. Tileston v. Ullman,* 318 U. S. 44 (1943). Here, any right to invalidate the contracts for alleged lack of mutuality or value belongs to the Commonwealth *and only to the Commonwealth.* The Commonwealth, however, has stated its satisfaction with the contracts and the schools' performance, and is prepared to make the payments. Appellants lack the capacity to contradict that decision.

D. The Lower Court Properly Balanced the Equities in Limiting Its Injunction Order to Prospective Action.

1. The Financial Crisis Facing Nonpublic Education.

Appellants in their brief at page 26 state that "only the most compelling circumstances have been found ap-

propriate by this Court to limit a judicial ruling to a prospective application." They then go on to make the rather extraordinary argument that compelling circumstances are justified in the field of *municipal bond financing* but should not apply to such vital institutions as our *nonpublic schools.*

As pointed out in the Gurash Report (see attached Appendix B, pages 4-6) there is no institution more precious to the survival of a free democracy than our total educational system, with our local and national commitment to pluralism. See in particular the words of President Nixon (at page 4 of the Gurash Report) where, in a speech on August 17, 1971, he addressed himself to this problem and stated:

> "In the homes, churches and schools of this nation, the character of the coming generation is being forged. We must see to it that these children are provided with the moral, spiritual and religious values so necessary to a great people in great times. *As we see those private and parochial schools,* which lay such stress on those values, *close at the rate of one a day,* we must resolve to stop that trend and turn it around. And you can count on my help in doing just that." [Emphasis added]

2. Plaintiffs Should Not Be Permitted to Belatedly Prevent Payment When They Failed to Exhaust Their Judicial Remedies—i.e., a Right to Seek a Temporary or Preliminary Injunction, and Appeal the Denial Thereof to This Court.

As developed in the Statement of the Case, (see pages 2 through 5) and as amplified in the Conclusion below, plaintiffs totally failed to exhaust their legal remedies by

seeking, and appealing if necessary, the denial of a request for a preliminary injunction.[14]

Now they belatedly attempt to block payment. It is too late. The lower court would not countenance it—and we respectfully submit, neither should this Court.

CONCLUSION.

Appellants won a landmark victory before this Court in having Pennsylvania Act 109 stricken down—albeit not on the grounds they advanced in their briefs to this Court. One would have thought that this would vindicate their efforts, without attempting now to bar payment of the funds earned before the decision, and without putting the schools, who so desperately need these funds, to the additional delay, burden and expense of these appeals. But appellants have a legal right to do so—and so be it.

However, we can not let go unchallenged their erroneous and irresponsible high-sounding appeal to public policy at page 34 of their brief, where they charge the Legislature of Pennsylvania—and indirectly those who seek and support aid to nonpublic education—with conduct tantamount to conspiracy, legislative fraud and an abuse of the judicial process.

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14. See 28 U. S. C. § 1253 (1966) which reads as follows:

§ 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Thus the charge is made, both thinly veiled and directly asserted,[15] that proponents of aid to nonpublic schools may attempt, or have attempted to and succeeded in getting approval by the Legislature of acts of dubious constitutionality with the knowledge that they can continue to receive the funds in the interim while appeals drag through the courts. Neither the procedural facts in the instant case, nor the workings of the legislative process, nor the judicial procedures for review of state action support such expression of alarm.

Plaintiffs stood benignly by as the eligible schools were reimbursed for their services during the first two years under a decision of the three-judge court which found the Act constitutional. Notwithstanding this adverse decision, they could have pressed for a preliminary injunction to enjoin any and all payments at the time of their original action. If unsuccessful in their petition, they were entitled to an immediate review by the appellate court. But plaintiffs chose not to follow this straightforward route. In fact, as appears from the Statement of the Case in this brief (see pages 2 through 4), they voluntarily withdrew their motion to enjoin the first year's payment and never attempted thereafter to even enjoin payment, let alone appeal to this court had they been turned down.

Rather, at this late date they stand before the Court,—which found Act 109 had a proper secular purpose and re-

15. See, for example, statements appearing in their brief at page 8, and in particular the following language taken from their brief at page 34, which reads as follows:

"One pernicious result of the ruling below is that it may encourage legislatures to continue seeking ways to get public funds into the religious schools through constitutionally dubious means, in the belief that some subsidy is better than none, and in reliance on the lower court's notion that 'contractual' subsidy arrangements entered into before a statute is declared void will safeguard subsequent payment of the subsidy even if only on a temporary basis."

jected the contention that reimbursement in this instance would lead to legislative shams in aid of religion,—and ask for a retroactive ruling enjoining such payments.

Such over-zealous advocacy shocks us. It unmistakenably demeans the legislative and judicial process.

Furthermore, it is precisely this kind of advocacy, by those who unreasonably oppose the legitimate efforts of concerned citizens [16] and dedicated leaders in government and legislators to find a constitutional way to preserve pluralism in education, that prompted Judge Palmieri, dissenting in the recent three-judge court decision in *Committee for Public Education and Religious Liberty v. Levitt*, Civil No. 70-3251 (S. D. N. Y., filed April 27, 1972), to state:

> "To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.* It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.
>
> I am constrained to decline to participate in destroying this legislative act by judicial action."

* "This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation."

16. See, for example, the Gurash Report and the make-up of that blue ribbon committee described therein. This nonpublic school crisis is deadly serious. A lot of dedicated people, including the President of the United States, want to see it resolved in a proper constitutional fashion.

For the convenience of the Court, we have attached as Exhibit "A" to this brief Judge Palmieri's dissent in its entirety.

For the several reasons stated in the preceding sections, Appellants' constitutional claims are without merit. The Pennsylvania Association of Independent Schools respectfully submits therefore that the decision of the three-judge court properly decided these issues. Accordingly, the judgment entered by the United States District Court for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

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ROBERT L. PRATTER,
JANE D. ELLIOTT,
Attorneys for Appellee
Pennsylvania Association of
Independent Schools.

Of Counsel:

DUANE, MORRIS & HECKSCHER.

EXHIBIT "A".

70 Civ. 3251

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Plaintiffs,

—against—

ARTHUR LEVITT, AS COMPTROLLER OF THE STATE OF NEW YORK, ET ANO.,
Defendants,

and

CATHEDRAL ACADEMY, ALBANY, NEW YORK, ET AL.,
Intervenor-Defendants.

OPINION

DISSENTING

EDMUND L. PALMIERI, D. J.

PALMIERI, *J.*

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they

attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.[1] It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of these who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Gov-

1. This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

ernor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U. S. 672, 678 (1971), that

> "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication"

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U. S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U. S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U. S. 644 (1970).[2] If, as the Supreme Court pointed out in *Allen, supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function," then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U. S. 602 (1971), which requires the conclusions reached by the

2. This language is borrowed substantially from P. O. A. U. v. Essex, 28 Ohio State 2d 79 (1971).

majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials."

Accepting, as I believe we must, the basic premise that no perfect or absolute separation between religion and government is really possible, see *Walz v. Tax Commission of the City of New York, supra* at 670, I agree patly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State v. Oakey* (D. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

EDMUND L. PALMIERI
Edmund L. Palmieri
U. S. D. J.

Dated: April 27, 1972

EXHIBIT "B".

Gurash Report—Financial Crises of Catholic Schools in Philadelphia and Surrounding Counties.

THE REPORT OF THE ARCHDIOCESAN ADVISORY COMMITTEE ON THE

FINANCIAL CRISES OF CATHOLIC SCHOOLS

IN PHILADELPHIA AND SURROUNDING COUNTIES

JOHN T. GURASH CHAIRMAN

Philadelphia, 1972

THE
REPORT OF THE
ARCHDIOCESAN ADVISORY COMMITTEE
ON THE
INANCIAL CRISIS OF CATHOLIC SCHOOLS
HILADELPHIA AND SURROUNDING COUNTIES

JOHN T. GURASH
Chairman

1972

FOREWORD

This report of the Advisory Committee on the Catholic Schools which has been approved by all members, is, we believe, the most comprehensive survey of their problems — and the relationship of their plight to the difficulties facing the public schools — that has ever been made anywhere in the United States.

In large measure this must be credited to the cooperation of John Cardinal Krol, Archbishop of Philadelphia, and his aides, who gave the committee's staff unprecedented access to data of all kinds. These data included not only enrollment and financial records of the Catholic schools, but also statistics on parish finances, on novitiates and seminary applications, and many other related factors.

It took courage and resolution to open such records for examination by an impartial, non-sectarian committee of laymen, and I know that the members of the committee join me in expressing our appreciation of Cardinal Krol's determination to make full disclosure of the facts, in order to help the community to accurately assess the full dimensions of a crisis whose impact will be felt by the community as a whole, and not merely by Catholics.

The committee came into being as a result of a letter from Cardinal Krol to me on July 22, 1971, asking me to select and head such a group. In the ensuing conversations and correspondence, we agreed that an advisory committee of the kind he proposed could best serve the community in three ways:

—By bringing up-to-date and making all-inclusive a study which had been made of the public schools' financial straits, for it is self-evident that a collapse of the Catholic school system would aggravate the public schools' difficulties to an almost unimaginable degree.

—By bringing the up-dated study to the attention of various segments of the community, including civic and government leaders, the labor movement, businessmen, and others.

—By opening a dialogue where Catholic and non-Catholic alike could contribute ideas towards the solution of a problem that the entire community shares.

It was specified, however, that the advisory committee would not be asked to undertake research or submit recommendations relating to governmental aid at any level, to legislative action, or to parish aid, nor would the group engage in fund-raising appeals.

Thirty leading citizens of the Philadelphia area, representing business, labor, government, education, and the community at large, agreed to serve on the advisory committee. This group included men and women of various religious, ethnic, and social groups. It was as true a cross-section of the total community leadership as one could wish.

Under the direction of the committee, a technical staff obtained, analyzed, and interpreted the facts concerning the impact of the Catholic schools on the economic and social development of the Philadelphia metropolitan area, as well as the current financial condition of the Catholic schools and projected trends.

In addition to the records of the Archdiocese and its parishes, the committee's staff also drew upon expert advice, opinion, and factual studies from several outside, independent sources.

This report, which deals solely with the factual circumstances as they exist and are expected to develop in the months and years ahead, will serve as a basis for the discussion of the options which are open to our community in its efforts to cope with the crisis in Catholic and public education today. In the immediate future the committee will present an outline of these options to Cardinal Krol.

As the community dialogue on this problem begins, let us bear in mind that what we are talking about is not really a "Catholic problem" at all, but a dilemma of our total society, and that Americans of every faith — and of none — have a stake in its solution. The education of every child is the concern of every citizen.

When I announced my acceptance of the chairmanship of this committee, I told the press: "I cannot prejudge the work of this committee by speaking in any detail about the future, but I can say this: An America without a strong network of non-public schools would be a nation which had lost one of its great strengths. I do not think this country can afford to let that happen."

After many months of work and deliberation, the committee as a whole shares my conviction. Now we solicit the help of the entire community in determining how our society should confront this challenge to its pluralistic strength.

John T. Gurash
Chairman

Philadelphia, 1972

SOCIAL ASPECTS OF THE PROBLEM

This report from the non-sectarian Catholic School Advisory Committee appointed by Cardinal Krol deals with the facts which the Committee finds and believes to exist with respect to the diocesan high and parish elementary schools in the Archdiocese of Philadelphia, and particularly those schools within the City of Philadelphia.

The Committee has made these findings and estimates based on lengthy studies conducted by experts in the fields of Economics, Finance, and Education, as set forth more fully in the body of the report.

I. This report focuses mainly on the facts concerning the economic and financial aspects of education in the Catholic Schools in the Archdiocese of Philadelphia, and the facts and estimates concerning the tremendous financial impact the closing of Catholic Schools would have upon the finances of the Philadelphia Public School System. However, education encompasses other and broader factors which involve not only our economic life, but also the entire spectrum of social, political, and spiritual values that are part of the fabric of life in a free society.

It is in that area, also, that non-public education makes an enormous contribution.

The teaching of duty, responsibility, hard work, frugality, ethics, and proper conduct are part of America's past and are desirable and important for America's future. President Nixon, in a speech on August 17, 1971, stressed the importance of the non-economic facets of education, when he said:

"In the homes, churches and schools of this nation, the character of the coming generation is being forged. We must see to it that these children are provided with the moral, spiritual and religious values so necessary to a great people in great times. As we see those private and parochial schools, which lay such stress on those values, close at the rate of one a day, we must resolve to stop that trend and turn it around. And you can count on my help in doing just that."

This Committee endorses and supports this statement by the President of the United States.

II. Catholic and other parochial schools are committed to an educational philosophy involving morals, conduct, and spiritual as well as intellectual excellence.

While most non-public school children are in Catholic schools, they are also to be found in schools conducted under Jewish and Protestant auspices. By virtue of the demands made upon them and the services they have provided historically, Catholic and other non-public schools are in fact fulfilling a public need. The Jewish scholar, Will Herberg, said:

"Parochial schools . . . perform a public function, supplying a large

...er of children with an education that is everywhere taken as the equiv-...ent of the education given in public schools."

...ethodist Bishop Fred Corson said:

"They (the Catholic schools) have broadened the purposes of parochial ...ucation and have associated it more closely to a philosophy of life rather ...an the perpetuation solely of a sectarian position. They have encouraged a ...illingness to adjust to meet the changing needs and they have introduced the ...tire community to the contributions made by private education and the ...roblems involved in a pluralistic society."

...I. The American tradition of educational diversity has been a great ...rength to our educational system and should be preserved.

...merican society needs and grows on educational diversity. Catholic and other ...on-public schools offer and provide an important educational alternative to ...e community.

...V. The individual citizen's right to choose the kind of education which he ...ishes his children to have is an important right and should be preserved.

...atholic schools provide all parents with an opportunity for expressing a ...eedom of choice about education. This concept of diversity or freedom of ...hoice for parents received strong backing from the United States Chamber ...f Commerce Task Force Report on American Education, which pointed ...ut that:

"We take this diversity for granted in scholarship, in politics, and in the ...bundance and variety of the commercial marketplace. Why settle for the ...ingle choice in education? . . . We think it desirable that parents have a choice ...f schools for their children . . . Different schools, none of them perfect, will ...ave different combinations of strengths and weaknesses. Parents . . . should ...e able to choose to find the combination that best satisfies them and their ...hildren."

...ot to be overlooked in this connection is the importance of the right an ...ndividual citizen has to select for his children a combination of secular educa...ion and religious education.

...I. Catholic schools are a stabilizing factor in the life of our urban ...ommunities.

...he existence of good Catholic schools in the area acts (as do good schools ...enerally) to strengthen a community and as a strong retentive force for the ...opulation. The schools provide a focal point for neighborhood identification, ...ommunity pride, and, consequently, lend social and economic stability. These ...chools enhance the quality of life in our cities and suburbs. They are an ...mportant community asset, attracting and retaining in each community sub...tantial numbers of hard-working financially stable families.

...VI. The example set by the Catholic schools of efficient and economically

constructed and operated facilities is also important.

The spur of competition is good for all schools — public, parochial, or private — fostering constant evaluation and reevaluation of objectives, performance, use of resources and economy. The existence of Catholic schools provides for other schools another benchmark or standard for evaluating educational effectiveness and other measures of performance.

VII. In addition to the foregoing, the resources committed to supplying Catholic education in the Philadelphia area provide this community with:

- a quality education for one out of three children in the City of Philadelphia and comparable numbers in the four surrounding counties.
- an important source of a skilled labor force and an educated citizenry.
- a source of community and business leaders.
- a full range of student activities which provide educational, social and recreational services to the community at large and develop in the students themselves a sense of social responsibility.
- substantial facilities and personnel to undertake the education of minority groups and the poor. This aspect of social contribution of Catholic resources was prominently noted by President Nixon in his Message on Educational Reform, March 3, 1970, in which he comments:

"They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

These resources exist today and represent potentially a powerful instrument for social awareness and change. The resources so committed should be conserved along with our other national resources.

The community stake—both economic and social—is high. Independent of full acceptance of the benefits claimed or value judgments implied, the Catholic and other non-public schools of the Philadelphia community are a substantial factor to be reckoned with and assessed.

VIII. There exists between the public and parochial school system of Philadelphia a large measure of interdependence, cooperation and interaction.

The importance and significance of the close working relationship between the two systems—and their effects upon each other—were spelled out very clearly by the Philadelphia Board of Education and the Philadelphia Archdiocesan Board of Education. Calling for a joint solution to their common problems, together they stressed:

"The education of the children of Philadelphia depends upon the strength of two great educational systems: the public school system and the parochial school system. Each is essential to the welfare of the city and its children; each is fundamentally dependent upon the other. If one suffers, the other inevitably suffers."

On the following pages are the facts as to the costs associated with providing the benefits outlined briefly above. At the same time, this report identifies the best estimates the experts employed by this Committee can make as to the huge costs to the Public School System of providing those same or similar serv-

ices—educational and social—should the Catholic schools no longer be able to do so.

This brief reminder of the benefits provided to the community by the Catholic schools provides a fuller context for evaluating the hard facts of the financial crises confronting Catholic schools in the Archdiocese of Philadelphia. The economic impact on the community is clear. The key questions for the community are:

Are the benefits worth the costs?

If so, how can these costs be met, and these benefits retained?

SUMMARY

Background

In his educational reform message to Congress on March 3, 1970, President Nixon stated:

"The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment . . . supplementing in an important way the main task of our public system."

Throughout the country, the Catholic school system constitutes the major element among non-public schools. In the City of Philadelphia, for example, 9 out of 10 children educated in non-public schools attend a Catholic school. Nowhere is the significance of Catholic schools as contributors to the education of young Americans more apparent than in Philadelphia.

The school system of the Archdiocese of Philadelphia is comprised of more than 300 elementary and secondary schools in Philadelphia and its four surrounding counties (Bucks, Chester, Delaware and Montgomery). These schools provide educational services to over 230,000 children — 75 percent of whom are elementary students. In Philadelphia alone, one out of three children is educated in a Catholic school.

While there is general awareness of the high cost of education, only recently has attention focused on the financial crisis confronting Catholic school systems throughout the nation. Several studies, including one being developed by a panel of the President's Commission on School Finance, have been commissioned to determine the scope of these financial problems. Philadelphia Catholic schools also are faced with serious financial problems. What has been lacking is community awareness of the specific dimensions of these problems.

Purpose

The purpose of this report is to provide the facts about the present and projected financial condition of the Archdiocesan School System. The information developed is intended to:

1. serve as a basis for assessing the magnitude of the financial problem;
2. establish the facts required to promote community awareness;
3. provide the basis needed to formulate and evaluate alternative courses of action which can be recommended to the Archdiocese.

Major Findings

Our analysis covered key educational and financial data from both parish and school sources. Results of our analysis may be summarized as follows:

A. **There is a deficit now.** Analysis of the most recently available data provides new and important insight into the financial condition of parishes and schools in the Archdiocese of Philadelphia. In the fiscal year 1970, all parishes combined operated at a net deficit of $1.2 million. In addition to deficits ex-

perienced in the parishes, separate accounts for the elementary and the secondary schools showed that elementary schools incurred deficits of $193 thousand, while high schools spent $804 thousand more than available revenues. The combined school operation deficit for 1970 was, therefore, $997 thousand. Thus, the total deficit for 1970 incurred by the three operations — parish churches, elementary schools and diocesan high schools — was $2.2 million. During fiscal 1971, the deficit in parish operations alone jumped to $5.1 million, a four-fold increase over 1970. Although complete school financial data is not yet available for 1971, there is every probability that the total deficit will increase, due mainly to the elimination of state aid.

B. **Deficits will continue and will grow during the next several years.** Projections covering the school years 1972-73 (fiscal '73) to 1974-75 (fiscal '75) indicate that by 1975 the cumulative deficit in the schools will reach $55.4 million. That projection represents the deficit resulting from a concatenation of most probable conditions. The deficit could be as high as $84.1 million, or as low as $43.1 million. Deficits projected for the combined elementary and secondary schools appear graphically in Charts I, II and III, respectively.

Chart I

ARCHDIOCESE OF PHILADELPHIA – COMBINED ARCHDIOCESE PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975 ($ MILLIONS)

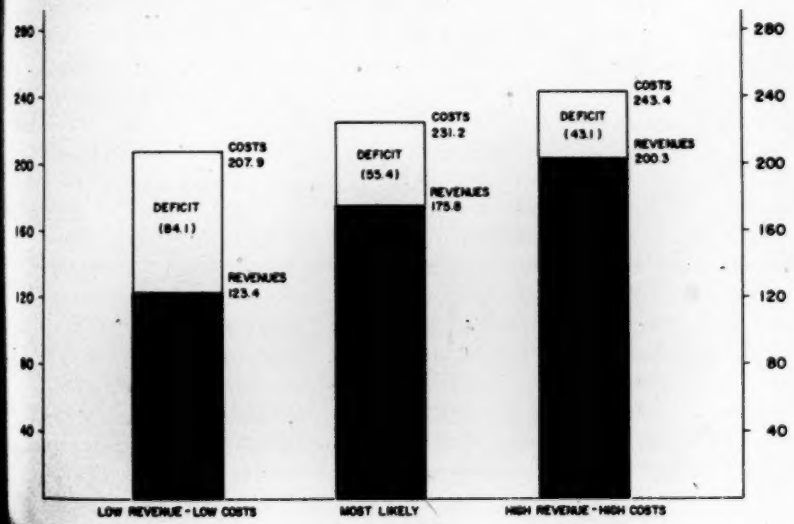


Chart II

ARCHDIOCESE OF PHILADELPHIA – ELEMENTARY SCHOOL
PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975
($ MILLIONS)

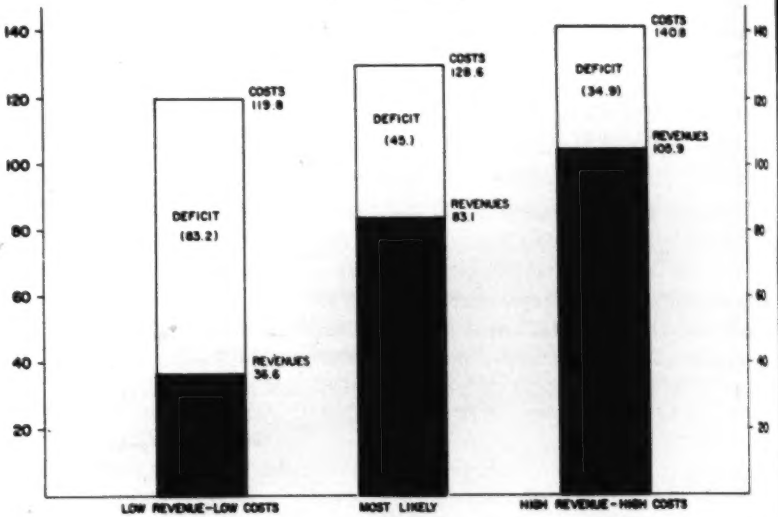
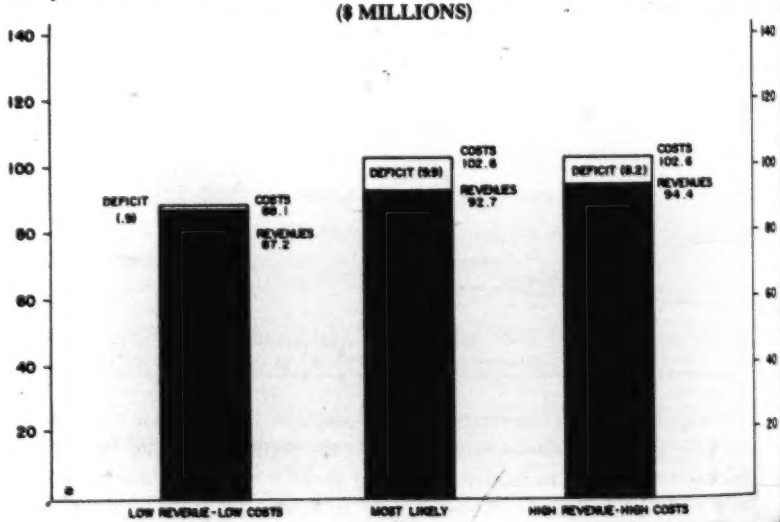


Chart III

ARCHDIOCESE OF PHILADELPHIA – SECONDARY SCHOOLS
PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975
($ MILLIONS)



Underlying the most likely cumulative deficit of $55.4 million is a $13.5 million deficit during fiscal '73, which rises to $19.0 million during fiscal '74 and climbs to $22.9 million in the school year 1974-75. During these respective years, it is expected that parishes will also be operated at combined cumulative deficits of more than $35 million, creating a projected total church and school operating deficit of $90.4 million.

C. **Revenues will fail to keep pace with costs.** A key factor determining future prospects for Catholic education is, of course, the ability of the church and schools to generate revenues sufficient to keep pace with costs. The cornerstone of the Catholic financial structure is the parishioner contributing through his church. The parish collection is the prime source of revenue funds needed to support the elementary school system, contribute financial support to the secondary schools, and provide for parish needs. Most signs point to a reduced flow of funds from the parishes. Parish revenues, derived mainly from church collections and socials, virtually stopped growing in 1971. Total operating receipts, for the combined parishes of the Archdiocese, increased by less than one percent during fiscal '71. When parish revenues cease to expand, pressures develop in elementary and secondary school budgets. **Nearly 46 percent of all parish revenues are used to support education.** Funding elementary schools takes 33 percent of total parish revenues; another 13 percent of parish revenues is channeled into the high school system from the parishes. At the elementary school level, parish funds represented 76 percent and 67 percent of the total elementary school budget in the years 1970 and 1971, respectively. Obviously, any diminution of the flow of funds through the parishes must have a substantial direct impact on school budgets. The main source of parish revenues (collections, which produce approximately 60 percent of revenues; and socials and donations, which provide another 16.5 percent of total revenues) are not growth-oriented sources. Experience in recent years indicates slower growth in revenues from the parish is likely to continue over the next four years. **If historical contribution rates are adjusted to correct for the effect of inflation, real (or price adjusted) revenues have actually declined in recent years.**

Although recent general economic conditions may account for some decline in contribution rates, evidence suggests that resumption of general economic growth may not yield an upward surge in parish revenues. Analysis of the relationships between average family contributions and average family income indicates that there is a less than proportionate increase in contributions associated with changes in income at higher income levels. The analysis reveals that the average contributor will increase his contribution more if, for example, his income increases from $8,000 to $9,000, than if his income were to increase from $15,000 to $16,000. There is evidence of a diminishing marginal rate of contribution based on income. **Thus, future growth of family income may not be adequate to generate the needed growth in revenues to cover burgeoning costs.**

Combined elementary and secondary school revenues are expected to reach $60.3 million in 1975, expanding at a compound annual rate of growth of 2.4 percent from $56.1 million in 1971-72. These revenues include funds from several sources: parish support and funding, tuitions, student fees and other sources. **But projected revenues fall far short of projected costs.**

D. **Costs will continue their upward spiral.** School operating costs, especially teacher salaries. have strong upward biases. Several factors reinforce the need to recognize the potential for explosive growth in the costs of maintaining the Catholic school system in Philadelphia. Any list of factors that will push costs up must include:

1. **Rising teacher salaries**—teacher salaries in Philadelphia Catholic schools are below national parochial averages. Additionally, unionization of lay elementary teachers and a movement toward an established level of parity even with Catholic secondary salary scales would exert heavy financial pressure on the school system. Further movement in the direction of parity of both Catholic elementary and secondary salaries to public school salary levels would create an added strain on the financial resources of the school system. Any one, or a combination, of these factors occurring would result in substantial cost increases in the operation of the schools.

2. **Declines in the availability of religious teachers**—inability to provide religious teachers to instruct in the schools would prove extremely costly in Philadelphia. The inability of the school system to avail itself of religious teachers (at relatively low salary costs) may arise because of either a lack of numbers of persons entering the teaching religious orders or by the orders themselves changing their mission. Declining ratios of religious to lay teachers translate directly into significantly higher costs — often a doubling of teacher salary costs. The availability in Philadelphia of a few large religious orders committed to teaching is both an advantage and a disadvantage: an advantage in that they lend an element of stability to costs; a disadvantage in that a decision on the part of any one order to change its mission would have a huge impact on salary costs and be a major destabilizing force. Presently, there are no indications of major shifts occurring in the missions of the large religious orders which support education in Philadelphia. However, a declining religious/lay teacher mix can be anticipated, especially in the high schools. As a result, total teaching costs will accelerate more rapidly than might normally be expected.

3. **Improving (declining) student/teacher ratios lead to higher costs** — student/teacher ratios represent one observable variable that may, rightly or wrongly, be interpreted as a measure of quality. It may serve thus as a measure of perceived quality. Further improvement in the student/teacher ratio in Catholic schools and the concomitant increased cost pressures associated with the reductions are anticipated.

Despite all these pressures, costs in the Catholic schools will remain substantially below the public school system when measured on the basis of cost

per student. To illustrate the gap, the cost per student in Archdiocesan schools projected for the year 1975 is $478 per student. Contrast this with the current cost (1971-72) of $1,027 per student in Philadelphia public schools which was estimated by the Federal Reserve Bank of Philadelphia.

E. **Not all schools are operating in the red.** As indicated by analysis of individual school operating statements, there are many schools which are not experiencing deficits currently. Although there is a substantial deficit overall, resulting from the fact that costs are rising at rates approximately three times as fast as revenues, this deficit is not distributed proportionately or evenly over all the schools.

F. **Catholic school enrollments declined in the last several years. Enrollment declines are projected to continue through 1975 and will add substantially, on balance, to the operating costs of the school districts in Philadelphia and surrounding counties.** The net additional cost depends upon projected rates of transfer from the Catholic to the public schools and the effect transfers will have on the amount of aid provided by the state. The cumulative impact over the three year projection period, assuming the rate of transfer implied in the basic forecast (5.7 percent compound annual rate), involves net additional costs in Philadelphia of $20.9 to $29.8 million. Additional costs for the four-county suburban area would be $24.4 million.

If the Catholic schools were to close down at the end of this year (1971-72), and all students were shifted to the public schools, the cumulative additional costs to 1975 would be: Philadelphia — $378.8 to $471.2 million; in the four-county surrounding area, the cost would be $274.8 million. Closing down all schools in the Catholic Archdiocese, therefore, would add an additional $653.6 to $746.0 million in total to operating costs over the next three years in the Philadelphia five county area.

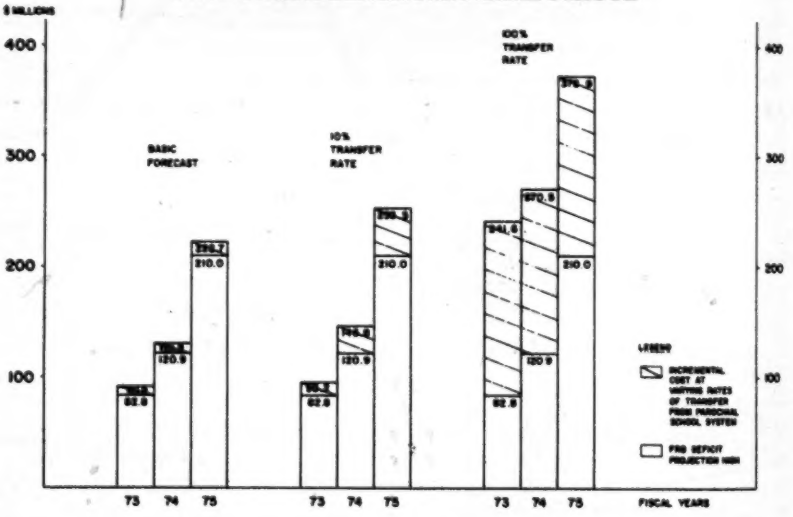
Assuming a longer-term closing pattern, 10 percent per year transfer, additional costs to the public school system in the time period 1972-73 to 1974-75 would be between $140.8 and $157.5 million. This amount is net of state aid, that is, the additional costs have been adjusted to reflect the fact that transfer of students may generate additional state-aid money for the receiving school districts.

Transfer of students from Catholic to public schools may have a beneficial effect on the financial status of the public schools in that state aid may increase. Within the mechanics of the state-aid ratio, it is possible for the state-aid ratio to rise, yielding higher state aid for not only the additional students but for the total receiving student body as well. But full benefits of transfer-induced state aid are not accrued until three years after the transfers occur. Thus, for example, if the Catholic schools were to close in '72, the public schools would receive no additional state aid in 1972-73, only a partial increase in aid in 1973-74, and the full impact in 1974-75 because of the manner in which state aid is calculated.

Comparison of the cost impact of various assumed rates of student transfer

on projected public school deficits is revealing. Shifts of enrollment to public schools in Philadelphia may add between $8.1 to $12.7 million to the public school deficits projected by the Federal Reserve Bank of Philadelphia, if the Basic Forecast proves accurate. Higher rates of transfer will involve, of course, higher additional costs. Immediate closing of Catholic schools (at the end of the 1971-72 school year) would add $158.0 to $162.8 million per year to the public school deficit projected by the Federal Reserve Bank of Philadelphia. A visual comparison of the effects of different assumed rates of transfer on costs is provided in Chart IV.

Chart IV
COMPARISON OF THE COST IMPACT ON PROJECTED PUBLIC SCHOOL DEFICITS OF ALTERNATE RATES OF TRANSFER FROM PHILADELPHIA PAROCHIAL SCHOOL



G. **Tuitions may provide a prime source of additional revenue to schools in the Archdiocese if, in fact, the Catholic community of Philadelphia continues to desire a viable parochial system.** There is no evidence of a strong relationship between changes in tuitions (or student fees as proxy tuitions) and declines in enrollment. To the contrary, evidence to date, and at the levels of tuitions now charged, seems to indicate that the demand for Catholic school education is insensitive to current tuition levels—which is not to say that future demand may not be. The recent increase in high school tuitions in the Archdiocese from $130 per year to $300 per year is outside the range of any prior experience here — real or statistical. It is too early to determine the full impact of that price rise on enrollments, but so far the effect appears minimal.

evidence, however, in the City of Philadelphia that direct charges (tuitions or student fees) in elementary schools are being paid for by an approximately equal reduction in church collections. This means that total support of the parish church-school complex is not likely to change level significantly — rather, parents will redistribute their giving, channeling funds directly into the school budget, by-passing the collection plate.

H. **Management information processes and systems are inadequate.** There is need for development of necessary information and systems for management analysis and control. Presently, ability to cope with the assessment of problems in a rapidly changing financial situation is limited. High levels of demand for sound financial and other key information are likely to be made upon the Archdiocese as the dynamics of the current financial crises unfold. Hard choices are ahead and they require hard information to manage either controlled balanced growth or decline. The current crisis does not appear to have reached the all or nothing stage. **There are options to explore.**

Perspective

The financial crisis pressing on the Archdiocesan schools, supporting parishes, and parishioners, is typical, in many ways, of the problem facing dioceses throughout the United States. In some places, the stage of the problem is more advanced — the communities involved have made their choice of how to solve the problem. Other communities are barely perceiving the existence of the problem. In Philadelphia, the problem is here and now. The time for learning the facts and making the choices is now. For the Catholic community, the time has always been now. There is, however, a new factor — a growing community awareness of the financial crisis facing non-public education, most significantly Catholic schools.

Many proposals for aid are now being discussed at the federal and state levels. There is, for example, **The President's Commission on School Finances,** including "The Panel on Non-Public Education." In Pennsylvania, there is the Mullen legislation for school aid. Legal and constitutional questions are by no means settled. There is considerable discussion about methods to finance education generally — tax credits, value-added taxes, and non-property tax bases. Many solutions have been proposed to deal with the problem facing Catholic education, and the sheer economics of education range from closing down all Catholic schools immediately, to limited consolidation or other forms of managed decline, to constructive cooperative programs between Catholic and public school officials. These programs include such cooperative efforts as shared-time, dual enrollment, programs or released time for religious education.

Summary

This Committee now has with this report:

1. The facts necessary to analyze and assess the financial crisis confronting the Archdiocese of Philadelphia school system.

2. A data base to determine and evaluate alternative courses of action for recommendation to the Archbishop of Philadelphia.

3. Information required to assess the impact of the financial problems of the Archdiocesan school system on the Philadelphia community and local public finance.

What is not available is an in-depth understanding of the attitudes of the Philadelphia area Catholic community. Attitudes reported from other parts of the country may or may not be representative of the attitudes of the Philadelphia community. To fill that gap and provide the correct perspective, a systematic program aimed at determining the basic attitudes of the Catholic community in the Archdiocese of Philadelphia must be pursued.

THE ARCHDIOCESAN ADVISORY COMMITTEE ON THE FINANCIAL CRISIS OF CATHOLIC SCHOOLS IN PHILADELPHIA AND SURROUNDING COUNTIES

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C. Application of *Lemon* v. *Kurtzman*, so as to deny to the schools reimbursement which they have earned, while accomplishing nothing on behalf of a public policy of non-entanglement between church schools and the State, will bring severe hardship upon the schools and do damage to all education in Pennsylvania. 24

CONCLUSION 30

SUPPLEMENTS:

Supplement A: The report of the Archdiocesan Advisory Committee on the financial crisis of Catholic Schools in Philadelphia and surrounding counties (*Gurash Report*). S-1

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STATUTES:

Act of August 27, 1971, P.L. —, No. 92, — Pa. Stat. Ann. —— 25

Act of July 12, 1972, P.L. —, No. 194, — Pa. Stat. Ann. —— 25

Act of July 12, 1972, P.L. —, No. 195, — Pa. Stat. Ann. —— 25

Pennsylvania Nonpublic Elementary and Secondary Education Act, Act of July 19, 1968, P.L. —, No. 109, Pa. Stat. Ann. .....*Passim*

Pennsylvania Statutory Construction Act, Act of May 28, 1937, P.L. 1019, art III, § 33, 46 Pa. Stat. Ann. § 533 12

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MISCELLANEOUS:

Composite of Nonpublic School Claims, Final Statistical Analysis Under the Provisions of Act 109 (1970-1971). Office for Aid to Nonpublic Education, Commonwealth of Pennsylvania, July 2, 1971. .. 5

Opinion of counsel No. 181, The University of the State of New York, re: Chapter 320 of the laws of 1965 [New York] Relative to Purchase and Loan of Textbooks, as amended by Chapter 795 of the Laws of 1966 21

Pittsburgh Post Gazette, July 19, 1968, p. 21 3

Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act 21

to show why such persons would perforce possess equities superior to schools which educate children today—or, indeed, why the latter should not, as a matter of law, be entitled to the benefits of the principles in question. Appellants attempt to overset the lower court's reasoning by broad statements such as: "[after *Norton* v. *Shelby County*] retroactivity continued to be accorded to judicial decisions almost without exception", and "Outside this line of authority [cases relating to bonds] the rule of retroactivity was almost invariably honored." (Brief, 21). But with, therefore, supposedly myriad cases to sustain them, the Appellants are able to provide discussion of only two—*Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924) and *United States* v. *Estate of Donnelly*, 397 U.S. 286 (1970). Under analysis, these two cases do not stand up as cases in point.

Tidal Oil held that a judicial decision, upon which a party had relied to its detriment, and which changed the law of property as stated in a different and earlier decision, did not constitute a law impairing the obligation of contracts under Article I, Section 10. Under the facts of *Donnelly*, there was no reliance upon any judicial decision construing a statute. Contrary to Appellants' contention, this case in no way may be read as overruling or limiting this Court's holding in *Chicot County Drainage District* v. *Baxter State Bank, supra.*

CONCLUSION

It is Respectfully Submitted That This Court Should Affirm The Judgment Below.

Dated August 21, 1972

Respectfully submitted,

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THE REPORT OF THE ARCHDIOCESAN ADVISORY COMMITTEE ON THE

FINANCIAL CRISIS OF CATHOLIC SCHOOLS

IN PHILADELPHIA AND SURROUNDING COUNTIES

JOHN T. GURASH CHAIRMAN

Philadelphia, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1470

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

Appeal from the United States District Court for the Eastern District of Pennsylvania

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EF FOR COMMONWEALTH OF PENNSYLVANIA AND FOR APPELLEE SCHOOLS

OPINION BELOW

e Opinion of the three-judge District Court for Eastern District of Pennsylvania is not yet re-d.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

nstitution of the United States, amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

nnsylvania Nonpublic Elementary and Secondary ation Act, June 19, 1968, P.L. ____, No. 109, Pa. Ann. Tit. 24 § 5601, *et seq.*

[1] is printed in Appellants' Jurisdictional Statement, 3 app.

QUESTIONS PRESENTED

On November 28, 1969, a three-judge District Court held Act 109 constitutional. Thereafter, the Appellee Schools renewed contracts under that Act whereby the Commonwealth agreed to purchase services from them. At the end of the 1970-1971 school term the Schools had fully rendered those services, thus, by the terms of the statute, becoming entitled to be reimbursed therefor. On June 28, 1971, the Supreme Court reversed the decision of the District Court.

The following questions are presented:

1. Where, in reliance on then existing constitutional standards and decisions of this Court, and upon the District Court's decision, the Appellee Schools, and schools not before the Court, executed statutory contracts with the Commonwealth providing reimbursement for specified services; and where in reliance upon and as required by said contracts, Appellee Schools and other schools not before the Court, incurred substantial obligations and expenses in the expectation of reimbursement, did this Court's decision of June 28, 1971, rendered after full performance of their contracts by the schools and the coming due of the payments under said contracts, require the court below to enjoin those payments?

2. Under the facts and circumstances of this case, did the court below exercise reasonable discretion in refusing to grant the requested injunction against payment of contract claims that ripened prior to June 28, 1971, where the issuance of said injunction would cause severe financial and administrative hardship to the Appellee Schools, to schools not before the court, and to the Commonwealth; and where the denial of

said requested injunction would result in no substantial hardship to the Appellants who seek such injunction?

STATEMENT OF THE CASE

On June 19, 1968, Act 109, authorizing the Secretary of Education to enter into contractual relationships with nonpublic schools for the purchase and sale of secular educational services, became law. Section 4 of the Act limits these services to the four specific subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. The Act provides that instruction in such courses

> "... shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." (Sec. 3(3)).

By statutory definition, "actual cost" for which reimbursement may be made is limited exclusively to three items of direct expenses: textbooks, instructional materials, and teachers' salaries. (Sec. 3(6)). Following the established pattern of governmental purchase of other welfare services, the Act requires payment to be made only *after* services are rendered.

The Commonwealth then created machinery for the administering of the Act, promulgated regulations, convoked an Advisory Board of educators to consult as to the Act's operation, and commenced entering into contractual relationships with approximately 1181 nonpublic schools throughout the state pursuant to the provisions of the Act.

On July 18, 1968, the Appellants (the Plaintiffs below) announced to the news media that they were challenging the constitutionality of the Act[2]. How-

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[2] See *Pittsburgh Post-Gazette*, July 18, 1968, 21.

ever, only on June 3, 1969, a year after the Act had been in operation, did they file their Complaint [3]. Thus the program had already become fully established, Pennsylvania's nonpublic schools having now expended funds, adjusted curriculum and undertaken administrative changes in reliance upon the continuing operation of the Act.

Following the withdrawal by Appellants (Plaintiffs below) of their action against the seven defendant schools as a class action, and their refusal to bring the numerous and different kinds of sectarian and nonsectarian schools into the case [4], the court below on November 28, 1969, granted the motion of Appellees (Defendants below) to dismiss for failure to state a claim as to the unconstitutionality of Act 109 and held the Act constitutional. See *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D. Pa. 1969).

After that date, the nonpublic schools formally renewed their contracts with the Commonwealth under Act 109 for the school year 1970-1971. Payments to the schools under these contracts were, by the terms of Section 7(a) of the Act, due commencing on September 1, 1971, as reimbursement for services performed by the schools from September 1, 1970, to the end of the school year in June, 1971.

Pursuant to the contracts in question, the nonpublic schools in Pennsylvania, during the 1970-1971 school year, rendered in excess of five million hours of instruction to Pennsylvania children in the four subject

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[3] See Brief of Appellants, 4.

[4] Appendix, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). (A42, A54, A58–A63).

areas covered by the Act[5]. They likewise expended substantial sums in administrative costs necessitated by their assumption of the contract obligations.

The said contracts were executed by Appellee Schools in reliance upon the Establishment Clause test theretofore enunciated by the Supreme Court, namely that the statute have a secular legislative purpose and no primary effect that either advances or inhibits religion, as had been most recently confirmed by this Court's decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). That test was applied by the District Court below. *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (1969).

After the completion of the 1970-1971 school term and full performance by the schools of their contracts, this Court issued its opinion in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), stating that "[T]he cumulative impact of the entire relationship arising under the [Act] . . . involves excessive entanglement between government and religion" (*id.* at 614) and finding such "entanglement" particularly occasioned by the fact that payments under Act 109 were to be made "directly to the church-related school." *Id.* at 621. Hence the Court remanded the case for further proceedings consistent with its opinion.

The court did not adjudicate the question of payment for past completed contracts or preclude such payment. On July 21, 1971, the Commonwealth and the Appellee Schools petitioned the Court for rehear-

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[5] *Composite of Nonpublic School Claims, Final Statistical Analysis Under the Provisions of Act 109* (1970-1971). Office For Aid to Nonpublic Education, Commonwealth of Pennsylvania, July 2, 1971.

ing. The subsequent Order entered for the Court by Mr. Justice Black denied that petition "without prejudice".

In the District Court the Commonwealth and the Appellee Schools filed a Motion praying that the injunction be so framed as to direct the Commonwealth to pay its debts to the schools "for services rendered but yet unpaid for, pursuant to contracts entered into at a time when the Act was presumed valid and had been held valid by this Court." This Motion specifically alleged, in its third paragraph, the following:

> ". . . the schools . . . fully performed their obligations under the contracts by rendering secular educational services and actually expending sums of money for teachers' salaries, textbooks and instructional materials. In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same." (A 12-A 13).

The Plaintiffs' (Appellants') Answer to that Motion did not deny the aforesaid allegations respecting the reliance of the schools and their making of expenditures based upon such reliance. Instead, it described the contracts as a "fictional contrivance" and asserted the schools' reliance to be unjustified (in Appellants' opinion) on the ground that "the defendants were on notice that the constitutionality of the Act was highly questionable." (A 16).

The District Court, on December 28, 1971, issued an Order enjoining payments "for services performed or costs incurred for any period subsequent to June 28, 1971", thus permitting reimbursement for the

1970-1971 school year. On February 22, 1972, that court, in a unanimous opinion, set forth at length the reasons why it believed such reimbursement to be justified. On the question of justifiable reliance on the part of the schools, the court said:

> "There is no doubt that such reliance was justified by the presumption of constitutionality which attached to the Act upon its signing into law, *Philadelphia* v. *Depuy*, 431 Pa. 276 (1968) and, a fortiori, by the decision of this Court, in the first instance, holding the Act constitutional. There is no dispute that to deny the church-related schools any reimbursement for their services rendered would impose upon them a substantial burden which would be difficult for them to meet. To avoid this hardship, we concluded the funds allocated to reimburse the non-public schools for services rendered in the school year 1970-1971 may be paid." *Lemon* v. *Kurtzman*, ____ F. Supp. ____ (E.D. Pa., Feb. 22, 1972). (Jurisdictional Statement, 9, 10, app.).

The three-judge court disposed of the Plaintiffs' (Appellants') contention that the contracts were "fictional" with the following reinforcement of the court's conclusions respecting the good-faith reliance of the schools:

> "Plaintiffs argue that the term 'contracts', as applied to these transactions, is misleading and that the payment of funds is, in fact, a subsidy. In the first instance, this Court rejected this argument, 310 F. Supp. at 39-40. In its opinion, the Supreme Court apparently accepted this interpretation. 403 U.S. at 610. At any rate, whether the reimbursement constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it lessen the reliance of the non-public schools on the payments or the subsequent hardship upon

them if the payments are not made. Defendants have raised the issue of the standing of plaintiffs to argue that these transactions did not constitute contracts. In so holding, we need not decide this issue." *Lemon* v. *Kurtzman*, ____ F. Supp. ____, footnote 6 (E.D. Pa., Feb. 22, 1972). (Jurisdictional Statement, 9 app.).

SUMMARY OF ARGUMENT

In 1968 the Pennsylvania legislature enacted Act 109 whereby, adopting the purchase of service concept employed in governmental support of health care and welfare work by voluntary (including sectarian)[6] agencies, the Commonwealth purchased educational service from non-public (including sectarian) elementary and secondary schools. The purchased instructional service was required to be secular in content, and, in aid of that objective, was statutorily limited to the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. As with all purchase of service programs, payment was based, not upon a budget, but upon actual cost. This cost was limited to two items: teacher salaries (for classroom hours logged in the four subjects) and secular textbooks and instructional materials (pertaining solely to the four subjects) having prior state approval.

The state legislature declared this program to be in direct response to a general educational and financial crisis in Pennsylvania in which public and nonpublic education were inextricably linked. One fourth of all school children in the Commonwealth attend nonpublic (including parochial) schools.

Appellants attack the decision below on three grounds: (a) that no equities exist in favor of the

[6] *Schade* v. *Allegheny County Inst. Dist.*, 386 Pa. 507 (1956).

schools which would justify the payment to them of the reimbursement earned pursuant to the contracts entered into under the Act (b) that any reimbursement made to the schools would involve the "excessive entanglements" between church-related schools and the state at which the decision in *Lemon* v. *Kurtzman* was aimed (c) that, even if strong equities exist in favor of the schools, and even if no undue administrative entanglements would result from the reimbursements, the payments are constitutionally barred because of the effort of this Court "to withdraw the issue of parochial school aid from the political arena."

Appellants' extreme position reveals a basic misunderstanding both of the criteria which this Court has developed with respect to the effect of judicial nullification of legislation, and of the plainly worded provisions of Act 109.

Reimbursement to the schools is amply justified on the basis of their unassailable good-faith reliance upon agreements which are true contracts under applicable Pennsylvania law. The lower court was correct in stating that, after such reliance, to deprive them of the consideration which they have honestly earned would work extreme hardship upon them. Furthermore, it would be damaging to basic interests of the Commonwealth at a time of a worsening educational crisis in the major cities, coal regions and other areas of the state.

No "entanglement" in any form of monitoring or inspection of religious schools, or the segregating of their expenses between religious and secular items, can now take place. The classroom instruction, for which the reimbursement for a teacher's salary is owed, long since took place (more than a year ago).

There is nothing left to monitor. The textbooks and instructional materials had to be approved even prior to then. The Superintendent of Public Instruction must legally be presumed to have performed his duty, under the Act, to see that its requirements of secularity were met. The post-audit, under the Act, takes place after the instruction is over and the textbooks have been used. It reviews solely the two accounts of actual cost of (a) teacher salaries and (b) textbooks and instructional materials in the four subjects. The audit does not, by the limits given in the statute, encompass a segregating of expenses of a school into secular and religious categories.

The making of the reimbursements will not undermine the non-"entanglement" policy enunciated in *Lemon*. The present injunction completely satisfies that policy.

Finally, the Appellants' *in terrorem* argument, which says that the earned reimbursements must be denied on the ground that this Court has withdrawn the issue of parochial school aid from the political arena, directly affronts liberties of speech, press, assembly and petition belonging to all citizens. The proposal that *any* legislation may be found to be unconstitutional because *any* group—racial, political or otherwise—campaigned for it or against it is constitutionally obnoxious. But to say that it must be found unconstitutional because *religious* groups campaigned for it or against it, is a direct and malevolent affront to religious liberty. If this proposal were to be adopted by this Court, it would not merely chill religious liberty: it would freeze it.

ARGUMENT

I. REIMBURSEMENT TO THE SCHOOLS OF THE COST OF SERVICES WHICH THEY PROVIDED IN GOOD-FAITH RELIANCE ON CONTRACTS, IS CALLED FOR ON THE BASIS OF EQUITABLE PRINCIPLES.

A. A True Contractual Relationship Was Created Between the Commonwealth and the Schools.

Whether the relationship between the Commonwealth and the Schools was founded upon a true contract was not deemed to be controlling by the three-judge court below in the view of the strong equitable factors which exist in favor of the schools.[7] The Commonwealth and the Appellee Schools had stated that position in their arguments before that court. The Appellants, nevertheless, pursue the question as though it were critical to their appeal. Thus it is necessary that it be shown that they are in error.

Under the law of Pennsylvania, which clearly governs here, the contracts are valid. In Act 109 the Pennsylvania General Assembly four times employed the term, "contract". The title of the Act recites authorization of the Superintendent of Public Instruction "to enter into *contracts* to carry out the intent and purposes of this act"; Section 2 (legislative findings and declaration of policy) states that the Commonwealth has the right "to enter into *contracts* for the purchase of needed service"; Section 3 (definitions) says that purchase of service shall be "pursuant to *contract*"; Section 5 (administration) empowers the Superintendent of the Public Instruction of "make *contracts* . . . necessary or convenient to the purchase of secular educational services hereunder." (Emphasis supplied).

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[7] See Opinion of that court, February 22, 1972. (Jurisdictional Statement, app. 9–10, Footnote 6).

The deliberate use of this legal term by the law-making body of the Commonwealth cannot be presumed to have careless or accidental (*Treaster* v. *Union Tp.* 430 Pa. 223, 228 (1968)), nor indeed fradulent (a "fictional contrivance", in the phrasing of the Appellants). (A 16). The Pennsylvania Statutory Construction Act provides that "Words . . . shall be construed . . . according to their common and approved usage" and that "technical words and such others as have acquired a peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning . . ." Act of May 28, 1937, P.L. 1019, art. III, § 33, 46 Pa. Stat. Ann. § 533. Whether "contract" be considered an ordinary word or a technical word, it is clear that, under the aforesaid canon, it cannot be construed to mean "gift", or "subsidy", or "contrivance". See *Commonwealth ex rel. Cartwright* v. *Cartwright,* 350 Pa. 638, 645 (1944); *Biddle Appeal,* 390 Pa. 460, 466 (1957); *Davis* v. *Sulcowe,* 416 Pa. 138, 143 (1964).[8]

Appellants misconceive both the nature of state contracts and of the requirements of the Act, when they further state that no contract here exists because, so Appellants aver, the schools, under the arrangement, did not have to "increase their enrollment or change their curricula, or do anything else of benefit to the

[8] For Pennsylvania law respecting consideration to support a binding promise see *Mikos* v. *Kida,* 314 Pa. 561, 172 A. 101 (1934); *York Metal & Alloys Co.* v. *Cyclops Steel Co.,* 280 Pa. 585, 124 A. 752 (1924); *Stearns* v. *Targe,* 34 D. & C. 2d 399, 52 Del Co. 96 (1964). The benefit to the Commonwealth and the detriment to the participating schools was: the Act's requiring a changover to the use of non-sectarian books in the four subjects, the standardized testing requirements for students and the requirements for teacher certification.

state." (Brief, 28) [9]. This Court, to the contrary, stated, as to both Act 109 and the Rhode Island statute considered by it in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971):

> "... the statutes themselves clearly state that they are intended to *enhance the quality of the secular education in all schools* covered by the compulsory attendance law. There is no reason to believe the legislatures meant anything else. ... As in Allen, *we find nothing here that undermines the state's legislative intent; it must therefore be accorded appropriate deference.*" *Id.* at 613. (Emphasis supplied).

The legislature knew, and the District Court found (see 310 F. Supp. 35, 39), that, but for the purchase of service program under Act 109, many nonpublic schools in Pennsylvania could not continue to carry their burden of providing education to children in a time of general educational and financial crisis in the state.

If Appellants' argument were to prevail, that no purchase-of-service contract could legally be said to exist between the state and private schools unless the latter were obligated to "increase their enrollment or change their curricula", then all purchase-of-service contracts between the state and voluntary child-care, health care, and care of the aged institutions would be a nullity. The very concept of purchase of service is grounded in the idea that private, voluntary agencies and institutions (prominently including sectarian agencies and institutions) afford invaluable services to people which it is in society's interest to avail itself of, instead of stimulating the further metastasizing of

[9] "Brief" herein refers to Brief of Appellants.

governmental bureaucracy. The purchase contracts are never conceived to depend upon the private agency's *enlarging its intake* or *changing its offerings*, and the notion that an exception should be made in the case of Act 109 is as without support in practice as it is without support in reason.

Plainly, the schools today hold true contracts with the Commonwealth for the 1970-1971 school year.

B. The Schools Were Justified in Relying, to Their Detriment on Their Contracts With the Commonwealth.

Were the schools justified in signing the contracts for the 1970-1971 school year? To answer this, certain background is needed:

At the time the contracts were signed, the Act was in its third year of operation. A huge segment of the total elementary and secondary school population of Pennsylvania was served by nonpublic schools—about 23 per cent. (Act, Sec. 2(2). Not only in the major metropolitan areas of Philadelphia and Pittsburgh, but also in the coal regions, the capacity of the nonpublic schools to keep going bore an intimate relationship to the increasing money-and-service crisis of Pennsylvania's public schools. Almost 1200 schools, carrying on the serious business of educating Pennsylvania children under the compulsory attendance laws, were long since fully participating in the program. This Court has said of those schools:

> "Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious

> organizations, largely by the gifts of faithful adherents." *Lemon* v. *Kurtzman*, 403 U.S. 602, 625 (1971).

Of course there was dependence, not only by these schools, but by the Commonwealth and the general community, upon the program afforded by Act 109. And all three were justified in relying upon the ongoing of the program. In its first year it was unchallenged in the courts. If reliance upon its continuation was justified at the end of its first year of unchallenged operation, such reliance was doubly justified in its second year when, following challenge and full briefing and argument in the court selected by the challengers, Act 109 was declared by that court to be constitutional. When the contracts for the school year 1970-1971 were entered into, therefore, Act 109 was not merely *presumed* constitutional; it had been *judicially determined* to be constitutional.

The three-judge court had decided the case on the basis of *Board of Education* v. *Allen*, 392 U.S. 238 (1968) and the purpose-and-effect test therein stated (a test which the Supreme Court, in *Lemon* v. *Kurtzman*, did not find Act 109 to fail to meet). For the Commonwealth to have refused to proceed with contracts for the 1970-1971 school year, would have been violative of its plain duty under the Act. For the schools to have refused to proceed with the contracts, would have been violative of their ethical obligations to their constitutent children, parents, and the community. The Commonwealth and the schools were plainly compelled to proceed with the contracts, and, following that, with all of the other filings, approvals and expenditures necessary in preparation for the continuance of the program into school year 1970-1971. Neither

could remotely have considered abandoning the already established and operating program merely on the ground that an appeal had been filed.[10]

The Appellants deny that the schools' reliance was to the detriment of the schools. The court below unanimously stated the opposite. It said that there was "no dispute" that to deny reimbursement for the services rendered would impose on the schools "a substantial burden which it would be difficult for them to meet." (Jurisdictional Statement, 10 app.). The court below likewise pointed out that, in reliance on the contracts, the schools had "adjusted their budgets . . . and performed the services required by them". (Jurisdictional Statement, 9 app.). The court was well justified in this determination. In the Motion Re: Framing of Injunction, submitted by the Commonwealth and the Defendant Schools, the following specific allegation appears:

> "In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same." (A13)

The Answer to Defendants' Motion Re Framing of Injunction did not deny that allegation. (A16-A17). The allegation is thus admitted of record.

Respecting the issue of hardship, Appellants argue in a circle. The court below had said that reimbursement for 1970-1971 could be made because of the equitable factors of, *inter alia,* the hardship which the

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[10] In this day when test-casing has become a way of life to some groups, adding heavy burdens to federal court dockets, it begs belief to insist, as do Appellants, that sovereign states should scrap programs, and the beneficiaries of the programs flee from them, merely because one more pressure group has filed one more test case.

schools would suffer through loss of the earned reimbursement. The Appellants respond to this by saying that there can be no hardship, due to the loss of the reimbursement, because the Court, in *Lemon*, had already "rejected out of hand" the idea that "state aid to parochial schools can be justified because their financial situation is desperate." (Brief of Appellants, 30). This circular argument thus fails entirely to meet the court's equity position respecting hardship. While the financial condition of the schools is not material in determining whether the Act violates the First Amendment, it is plainly of the essence in determination of the equity principle here involved. The "financial desperation" of nonpublic schools may indeed not justify state aid to them, but to say that the loss of a contracted-for, budgeted-for, and earned financial reimbursement of educational costs incurred by *any* educational institution these days is not a hardship to it, is both blind and irresponsible. Unhappily, the hardship is visited not on the nonpublic schools alone but upon the general community and the Commonwealth.[11]

In considering applications for injunctive relief, courts properly weigh the hardship to the party against whom such relief is sought as against that which the seeker of such relief stands to bear. Three individuals and six organizations initiated the challenge to Act 109. The court below held the six organization to have no standing to sue. 310 F. Supp. 35, 41 (1969). The three individuals, Alton J. Lemon, Priscilla Reardon, and Betty J. Worrell, have failed to show how the making of the reimbursement payments to the schools

[11] See Supplement A, the *Gurash Report*, prepared by a nonsectarian committee assessing the interrelationship of the nonpublic-public school crisis in Philadelphia.

would remotely affect them. This is not a class action.[12] The three individuals have not alleged (nor could they, logically) that non-payment would restore any religious liberty which has been denied them. Indeed, they would not be entitled to one cent of the withheld funds. Their lives and liberties would be totally unaffected. They have failed to demonstrate how they would actually suffer in any manner if the money were paid out or how they would gain in any manner if the money were not paid out. In short, it is difficult to understand the motivation of the Appellants in insisting on the denial of the equities which are so plainly now possessed by the schools. Appellants have, in practical terms, achieved their victory since there has now come to a halt a program of tremendous benefit to the secular education of over a half million children in the Commonwealth. With this they should rest content. They have nothing more to gain by their extreme pursuit of a harsh injunction. In balancing the equities, it is clear that the equities are heavily—indeed exclusively—on the side of the Appellee Schools and the Commonwealth in this action.

II. THE DECISION OF THE DISTRICT COURT IS SOLIDLY FOUNDED ON THE DECISIONS OF THE SUPREME COURT RESPECTING THE EFFECT OF JUDICIAL NULLIFICATION OF A STATUTE

As to the reach of a decree which nullifies a statute, this Court has said that there is "no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the board language of the Bill of Rights." *Williams* v. *United States*, 401 U.S. 646, 651 (1971). The Appellants, likewise, state that *Great*

[12] See record in Supreme Court of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (A42, A54).

Northern R. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), coupled with *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), ". . . made it clear that the Constitution is neutral on the subject of retroactivity in the abstract; that is, it neither forbids nor compels it." (Brief, 22, footnote 13).

Instead of an absolute rule, the Court has developed three criteria reflected in the following questions:

(a) What purpose is to be served by the new decree?

(b) To what extent has there been reliance upon the law as it was prior to that decree?

(c) What effect will application of the new decree have on the public policy which it seeks to advance?[13]

Under these criteria it is plain that the District Court was correct in refusing to enjoin the making of the earned reimbursement payments to the schools.

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[13] Speaking in a context of criminal cases, the Court stated in *Stovall* v. *Denno*, 388 U.S. 293, 296 (1967): "The criteria guiding resolutions of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards."

This Court in *Linkletter* v. *Walker*, stating that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective," also pointed out that, in doing so, "no distinction [is] made between civil and criminal litigation." 381 U.S. 618, 627, 628 (1965).

A. The Purpose To Be Served by This Court's Decision in Lemon v. Kurtzman—Prevention of Excessive Entanglement Under Act 109—Has Already Been Realized and Will Not Be Frustrated By the Making of the Reimbursements.

The Appellants say that reimbursement to the schools for 1970-1971 will require the state to

> ". . . examine into each school's curriculum content, methods of teaching, and segregation of expenses between 'secular' and 'religious' activities —thereby engaging in precisely the kind of entangling inquiry and surveillance that was explicitly forbidden by this Court. . ." (Brief, 16).

To appreciate the complete inaccurancy of the Appellants' charge, it is necessary to understand that the classroom instruction [14] for which reimbursement is sought, took place in the school year 1970-1971. That school year is long since over. While the schools were bound by contract to exclude from the four subjects "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," [15] the Commonwealth, in determining a school to be eligible for reimbursement, must be conclusively presumed to have made a determination that such school in no wise violated the statutory and constitutional [16] obligation of secularity of instruction. On what basis this determination was made—whether by classroom surveillance or otherwise—it is legally presumed to have been made.

As to that part of the instructional process which involved textbooks and other instructional materials,

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[14] It is limited to the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. (Act, Sec. 4).

[15] Act, Section 3(3).

[16] *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

the Rules and Regulations implementing the Act require specific advance approval of a list of textbooks submitted by the school to the Superintendent of Public Instruction.[17] The classroom instruction in which these approved books were employed took place in the school year, 1970-1971. As with those classes of two years ago, so with the textbooks then employed: the state has long since discharged its function with respect to them.

Finally, Appellants quote this Court's statement in *Lemon*, that "in particular, the [Pennsylvania] government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." (Brief, 16). Again, the Appellants misrepresent the statute and its effect. First, a post-audit power, by its nature, can involve no classroom monitoring, surveillance or teachers, or examination of teaching methods. An audit deals with expenditures, not with teaching plans or books. In terms of Act 109, it is a record of the money which a school expended. It is not a record reviewing tapes or transcripts of classroom proceedings. It is to be noted that the audit is limited to "accounts" pertaining to "the cost of secular educational service." "Secular educational service" is a defined term in the Act (Sec-

[17] Rules and Regulations For Implementing The Pennsylvania Nonpublic Elementary and Secondary Education Act, Sec. 5. This regulation is almost identical with that employed in the New York textbook program upheld by this Court in *Allen*. See Opinion of Counsel No. 181, The University of the State of New York Re: Chapter 320 of the Laws of 1965 [New York] Relative to the Purchase and Loan of Textbooks, as Amended by Chapter 795 of the Laws of 1966.

tion 3(2), (3)) and is limited to the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education (Section 4). It would be ridiculous to say that, as part of the process of *auditing accounts*, an *Auditor General* would or could undertake a program of classroom monitoring. The Appellants' quotation from *Lemon* respecting the post-audit power is inapposite (a power "to determine which expenditures are religious and which are secular"). By the terms of the Act, the expenditures can be made for solely the cost of *"teachers' salaries, textbooks and instructional materials" in the four subjects*[18] (Section 3 (6)), No discretion whatsoever is left to the post-audit process to determine which of these expenditures are religious and which are secular. Under the very terms of the Act, that determination had to have been *already* made with respect to *all three* items. The determination was made by the Superintendent of Public Instruction. He is empowered to purchase only "secular" educational services, as defined in the Act (and only in the four subjects) (Sec-

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[18] The following is the "audit" provision of the Act:

"Section 7. Reimbursement Procedures.—(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it *actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts* shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered." (Emphasis supplied).

tion 4), and it is under his direction that the complete administration of the Act takes place (Section 5). It was his responsibility and legal duty, and not that of the Auditor General, to take whatever steps were necessary to assure that the instruction, the textbooks, and the instructional materials in the four subjects were secular.

The Appellants also say that direct reimbursement payments to the schools would defeat the purpose to be served by the *Lemon* decision. The reference by the Court in *Lemon*, however, to "direct" payments (403 U.S. at 621) was solely in the context of entanglement. The Court had already in its opinion, declined to rule that these direct payments had a primary affect advancing religion. The sole stated reason for its outlawing them was excessive entanglements. As has been seen, no such relationships can possibly arise out of the making of the earned reimbursement payments. Further, had the Court considered direct payments to church-related institutions to be *per se* unconstitutional, it would have so held the grants in *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).

It is clear, therefore, that the purpose to be served by this Court's decision in *Lemon* v. *Kurtzman*—the prevention of excessive entanglement under Act 109—will not be frustrated by the making of the reimbursement payments.

B. The Court Below Properly Held That the Schools Had, In Good Faith and Justifiably, Placed a High Degree of Reliance Upon the State's Fulfilling of Its Obligation to Make Reimbursement.

The facts set forth herein, *supra*, were recognized by the court below as fully establishing a degree of reliance by the schools justifying a ruling that, so far as the reliance factor is concerned, they are entitled to reimbursement. Thus the second of the criteria enunciated by the Court in its decisions respecting the effect of judicial nullification of a statute is plainly met in this case.

C. Application of Lemon v. Kurtzman, So As To Deny to the Schools Reimbursement Which They Have Earned, While Accomplishing Nothing On Behalf of a Public Policy of Non-Entanglement Between Church Schools and the State, Will Bring Severe Hardship Upon the Schools and Do Damage to All Education in Pennsylvania.

The third criterion calls for an estimation of the effect which application of the new decree will have on the public policy which it seeks to advance. *Lemon* v. *Kurtzman* held that Act 109 called for excessive entanglements between church schools and the state. The injunction which the lower court has issued has put a stop to any and all such entanglements which could possibly arise under the Act. That injunction, therefore, completely satisfies the public policy which the decision of *Lemon* v. *Kurtzman* sought to advance.

The Appellants, however, seek to move this Court to adopt an *in terrorem* argument which, when examined, is seen to be a direct attack upon the civil liberties of supporters of God-centered education in our country.

This argument points out that, following the decision by this Court in *Lemon* v. *Kurtzman*, the following legislation was enacted in Pennsylvania: (a) a program whereby unearmarked payments are made to

parents who have children enrolled in nonpublic schools, Act of August 27, 1971, P.L. ____, No. 92, ____ Pa. Stat. Ann. ____; (b) a program modeled on that approved by this Court in *Allen,* of loaning secular, neutral, nonideological textbooks and instructional materials to children in nonpublic schools, Act of July 12, 1972, P.L. ____, No. 195, ____ Pa. Stat. Ann. ____; (c) a program for the furnishing of secular, neutral, nonideological guidance counselling, speech and hearing, remedial and therapeutic services, etc., to children in nonpublic schools. Act of July 12, 1972, P.L. ____, No. 194, ____ Pa. Stat. Ann. ____.

The Appellants say that this Court should deny the earned reimbursement payments for services rendered more than a year ago under Act 109 because the Pennsylvania General Assembly later enacted these pieces of legislation. When its full malevolent impact is seen, the argument begs belief. It denigrates the state legislature which created these laws. Each of those statutes must be presumed to have been enacted in full recognition of what this Court held both in *Allen* and *Lemon.* Before the Governor signed them into law, they were approved for legality by the Attorney General. None of these statutes contains any feature of direct, entangling aid to church schools which this Court has held to be unlawful.

An even more serious aspect of the Appellants' argument, however, is its implied denial of the rights of petition, speech, press and assembly of those citizens who support religiously affiliated education. The incredible assertion, presented to our highest court of law as a constitutional principle, comes to this: ***that even though a statute contains no constitutional infirmity whatsoever, it must nonetheless be declared unconstitu-***

tional on the extrinsic ground that, if it were upheld, some citizens would (or could, or might) decide to exercise First Amendment rights of speech, press, assembly and petition directed to the enactment of other legislation relating to the same area of concern.

Merely to state such a proposition—baldly, in its essence and shorn of a context of emotional pejoratives—is to reveal its repressive character. The extremity of this position is magnified when it is recalled that Act 109 was never held to have any effect of advancing religion. The Appellants charge that this Court ventured, in *Lemon*, "to withdraw the issue of parochial school aid from the political arena"—that is to say, that the Court, in effect, told the citizenry of the nation:

> "If you dare exercise your political liberties in an effort to secure enactment of a constitutional means to secure public aid to parochial schools (or to parents having children therein, or to such children), and if through use of the democratic processes you win acceptance of such legislation in the public forum and it becomes law, we will strike that law down solely for the reason that some people in the community sought to make a religious issue of the matter, or because we thought that some might."

The Commonwealth of Pennsylvania and the Appellee Schools utterly reject the notion that anything in American law, tradition or policy discountenances the efforts of any group to exercise manifest political rights. A promise to hold legislation unconstitutional merely because some religious groups want it and some others do not, would not place a merely chilling effect upon First Amendment rights: it would freeze

them. If anything is clear with respect to the history of the Religion Clauses of the First Amendment, it is that they were not intended to shut people up. Nor were they aimed at withdrawing any issue from the political arena.

If Appellants are correct in their rationale, they cannot logically single out "parochial school aid" as the one "religious" issue to be withdrawn from the political arena. If, as they say, *religious division along political lines* is the evil to be avoided, then campaigns *by religious groups* for or against the Prayer Amendment, legislation aimed at winning in or withdrawing from Vietnam, or relating to gambling, humane slaughter, welfare rights, drug abuse, government aid to Israel, or for or against liberalized abortion, Prohibition, trade with South Africa, Sunday Laws, conscientious objection, obscenity, "right to work" laws, etc.—all of which have created or are creating, religious division along political lines, must—if they succeed—result in unconstitutional legislation.

It is thus clear that the application of *Lemon* v. *Kurtzman*, so as to deny reimbursement to the schools, would have no adverse effect on a public policy aimed at non-entanglement between church schools and the state. The present injunction cuts off, for all the future, the offending interlocking of their administrative machineries. And no public policy exists, or could exist constitutionally, which would compel denial of the 1970-1971 reimbursement under Act 109 merely because other, constitutionally different, legislation was adopted in Pennsylvania or because supporters of God-centered education have dared exercise, in the pubic forum, First Amendment rights in an effort to see that a portion of the tax revenues to which they

contribute are used as an enabler of voluntarism in the field of education, in schools wherein the state's compulsory attendance law is fully satisfied.

On the other hand, denial of the reimbursement to the schools will injure them severely. Pennsylvania's nonpublic schools have operated at a per pupil cost far below that of the public schools while, at the same time, they have produced generations of educated citizens. The impact of the now forseeable closings of many nonpublic schools in Pennsylvania will create severe disorder and hardship in many public school districts. Every nonpublic school that can be saved, even temporarily, helps prevent a worsening of the overall educational and financial crisis in a state which, in March, 1971, went bankrupt and which today is sinking under growingly unmanageable social and economic burdens [19].

The three-judge court was correct in its application, in this case, of the doctrine of the *Great Northern* [20], *Chicot County* [21], and *Linkletter* [22] cases. Appellants admit that these cases hold that the presence of strong equities of good-faith reliance and hardship would, if present here, justify an exception to a so-called "retroactive" application of the *Lemon* decision. (Brief 21-23). Appellants, in their discussion of the foregoing cases, attempt to convey the impression that the principles of these cases should somehow be limited to bondholders or the criminally accused; but they fail

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[19] See, generally, Supplement A (*Gurash Report*).

[20] *Great Northern R. Co.* v. *Sunburst Oil Refining Co.*, 287 U.S. 358 (1937).

[21] *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940).

[22] *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

THE
REPORT OF THE
ARCHDIOCESAN ADVISORY COMMITTEE
ON THE
FINANCIAL CRISIS OF CATHOLIC SCHOOLS
N PHILADELPHIA AND SURROUNDING COUNTIE

JOHN T. GURASH
Chairman

1972

FOREWORD

This report of the Advisory Committee on the Catholic Schools which has been approved by all members, is, we believe, the most comprehensive survey of their problems — and the relationship of their plight to the difficulties facing the public schools — that has ever been made anywhere in the United States.

In large measure this must be credited to the cooperation of John Cardinal Krol, Archbishop of Philadelphia, and his aides, who gave the committee's staff unprecedented access to data of all kinds. These data included not only enrollment and financial records of the Catholic schools, but also statistics on parish finances, on novitiates and seminary applications, and many other related factors.

It took courage and resolution to open such records for examination by an impartial, non-sectarian committee of laymen, and I know that the members of the committee join me in expressing our appreciation of Cardinal Krol's determination to make full disclosure of the facts, in order to help the community to accurately assess the full dimensions of a crisis whose impact will be felt by the community as a whole, and not merely by Catholics.

The committee came into being as a result of a letter from Cardinal Krol to me on July 22, 1971, asking me to select and head such a group. In the ensuing conversations and correspondence, we agreed that an advisory committee of the kind he proposed could best serve the community in three ways:

—By bringing up-to-date and making all-inclusive a study which had been made of the public schools' financial straits, for it is self-evident that a collapse of the Catholic school system would aggravate the public schools' difficulties to an almost unimaginable degree.

—By bringing the up-dated study to the attention of various segments of the community, including civic and government leaders, the labor movement, businessmen, and others.

—By opening a dialogue where Catholic and non-Catholic alike could contribute ideas towards the solution of a problem that the entire community shares.

It was specified, however, that the advisory committee would not be asked undertake research or submit recommendations relating to governmental aid any level, to legislative action, or to parish aid, nor would the group engage fund-raising appeals.

Thirty leading citizens of the Philadelphia area, representing business, bor, government, education, and the community at large, agreed to serve on advisory committee. This group included men and women of various ligious, ethnic, and social groups. It was as true a cross-section of the total mmunity leadership as one could wish.

Under the direction of the committee, a technical staff obtained, analyzed, d interpreted the facts concerning the impact of the Catholic schools on the conomic and social development of the Philadelphia metropolitan area, as ell as the current financial condition of the Catholic schools and projected nds.

In addition to the records of the Archdiocese and its parishes, the committee's staff also drew upon expert advice, opinion, and factual studies from veral outside, independent sources.

This report, which deals solely with the factual circumstances as they ist and are expected to develop in the months and years ahead, will serve as basis for the discussion of the options which are open to our community in efforts to cope with the crisis in Catholic and public education today. In the mediate future the committee will present an outline of these options to ardinal Krol.

As the community dialogue on this problem begins, let us bear in mind at what we are talking about is not really a "Catholic problem" at all, but a lemma of our total society, and that Americans of every faith — and of none - have a stake in its solution. The education of every child is the concern of ery citizen.

When I announced my acceptance of the chairmanship of this committee, I told the press: "I cannot prejudge the work of this committee by speaking in any detail about the future, but I can say this: An America without a strong network of non-public schools would be a nation which had lost one of its great strengths. I do not think this country can afford to let that happen."

After many months of work and deliberation, the committee as a whole ares my conviction. Now we solicit the help of the entire community in ermining how our society should confront this challenge to its pluralistic ength.

John T. Gurash
Chairman

ladelphia, 1972

SOCIAL ASPECTS OF THE PROBLEM

This report from the non-sectarian Catholic School Advisory Comm appointed by Cardinal Krol deals with the facts which the Committee finds believes to exist with respect to the diocesan high and parish elemen schools in the Archdiocese of Philadelphia, and particularly those sch within the City of Philadelphia.

The Committee has made these findings and estimates based on le studies conducted by experts in the fields of Economics, Finance, and Edu tion, as set forth more fully in the body of the report.

I. **This report focuses mainly on the facts concerning the economic financial aspects of education in the Catholic Schools in the Archdioces Philadelphia, and the facts and estimates concerning the tremendous finan impact the closing of Catholic Schools would have upon the finances of Philadelphia Public School System. However, education encompasses ot and broader factors which involve not only our economic life, but also entire spectrum of social, political, and spiritual values that are part of fabric of life in a free society.**

It is in that area, also, that non-public education makes an enorm contribution.

The teaching of duty, responsibility, hard work, frugality, ethics, proper conduct are part of America's past and are desirable and important America's future. President Nixon, in a speech on August 17, 1971, stres the importance of the non-economic facets of education, when he said:

"In the homes, churches and schools of this nation, the character of coming generation is being forged. We must see to it that these children provided with the moral, spiritual and religious values so necessary to a people in great times. As we see those private and parochial schools, which such stress on those values, close at the rate of one a day, we must resolv stop that trend and turn it around. And you can count on my help in do just that."

This Committee endorses and supports this statement by the Presid of the United States.

II. **Catholic and other parochial schools are committed to an educati philosophy involving morals, conduct, and spiritual as well as intellect excellence.**

While most non-public school children are in Catholic schools, they are to be found in schools conducted under Jewish and Protestant auspices. virtue of the demands made upon them and the services they have provi historically, Catholic and other non-public schools are in fact fulfilling public need. The Jewish scholar, Will Herberg, said:

"Parochial schools . . . perform a public function, supplying a la

... of children with an education that is everywhere taken as the equiv-nt of the education given in public schools."

thodist Bishop Fred Corson said:

"They (the Catholic schools) have broadened the purposes of parochial ucation and have associated it more closely to a philosophy of life rather n the perpetuation solely of a sectarian position. They have encouraged a llingness to adjust to meet the changing needs and they have introduced the ire community to the contributions made by private education and the oblems involved in a pluralistic society."

. **The American tradition of educational diversity has been a great engths to our educational system and should be preserved.**

nerican society needs and grows on educational diversity. Catholic and other n-public schools offer and provide an important educational alternative to e community.

. **The individual citizen's right to choose the kind of education which he shes his children to have is an important right and should be preserved.**

tholic schools provide all parents with an opportunity for expressing a eedom of choice about education. This concept of diversity or freedom of oice for parents received strong backing from the United States Chamber Commerce Task Force Report on American Education, which pointed t that:

"We take this diversity for granted in scholarship, in politics, and in the undance and variety of the commercial marketplace. Why settle for the ngle choice in education? . . . We think it desirable that parents have a choice schools for their children . . . Different schools, none of them perfect, will ve different combinations of strengths and weaknesses. Parents . . . should e able to choose to find the combination that best satisfies them and their ildren."

ot to be overlooked in this connection is the importance of the right an dividual citizen has to select for his children a combination of secular educa-on and religious education.

. **Catholic schools are a stabilizing factor in the life of our urban mmunities.**

he existence of good Catholic schools in the area acts (as do good schools nerally) to strengthen a community and as a strong retentive force for the opulation. The schools provide a focal point for neighborhood identification, mmunity pride, and, consequently, lend social and economic stability. These hools enhance the quality of life in our cities and suburbs. They are an portant community asset, attracting and retaining in each community sub-ntial numbers of hard-working financially stable families.

. **The example set by the Catholic schools of efficient and economically**

constructed and operated facilities is also important.

The spur of competition is good for all schools — public, parochial, or private — fostering constant evaluation and reevaluation of objectives, performance, use of resources and economy. The existence of Catholic schools provides for other schools another benchmark or standard for evaluating educational effectiveness and other measures of performance.

VII. In addition to the foregoing, the resources committed to supplying Catholic education in the Philadelphia area provide this community with:

- a quality education for one out of three children in the City of Philadelphia and comparable numbers in the four surrounding counties.
- an important source of a skilled labor force and an educated citizenry.
- a source of community and business leaders.
- a full range of student activities which provide educational, social and recreational services to the community at large and develop in the students themselves a sense of social responsibility.
- substantial facilities and personnel to undertake the education of minority groups and the poor. This aspect of social contribution of Catholic resources was prominently noted by President Nixon in his Message on Education Reform, March 3, 1970, in which he comments:

"They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

These resources exist today and represent potentially a powerful instrument for social awareness and change. The resources so committed should be conserved along with our other national resources.

The community stake—both economic and social—is high. Independent of full acceptance of the benefits claimed or value judgments implied, the Catholic and other non-public schools of the Philadelphia community are a substantial factor to be reckoned with and assessed.

VIII. There exists between the public and parochial school system of Philadelphia a large measure of interdependence, cooperation and interaction.

The importance and significance of the close working relationship between the two systems—and their effects upon each other—were spelled out very clearly by the Philadelphia Board of Education and the Philadelphia Archdiocesan Board of Education. Calling for a joint solution to their common problems together they stressed:

"The education of the children of Philadelphia depends upon the strength of two great educational systems: the public school system and the parochial school system. Each is essential to the welfare of the city and its children; each is fundamentally dependent upon the other. If one suffers, the other inevitably suffers."

On the following pages are the facts as to the costs associated with providing the benefits outlined briefly above. At the same time, this report identifies the best estimates the experts employed by this Committee can make as to the huge costs to the Public School System of providing those same or similar ser-

—educational and social—should the Catholic schools no longer be able to do so.

This brief reminder of the benefits provided to the community by the Catholic schools provides a fuller context for evaluating the hard facts of the financial crises confronting Catholic schools in the Archdiocese of Philadelphia. The economic impact on the community is clear. The key questions for the community are:

Are the benefits worth the costs?

If so, how can these costs be met, and these benefits retained?

SUMMARY

Background

In his educational reform message to Congress on March 3, 1970, President Nixon stated:

"The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment . . . supplementing in an important way the main task of our public system."

Throughout the country, the Catholic school system constitutes the major element among non-public schools. In the City of Philadelphia, for example, 9 out of 10 children educated in non-public schools attend a Catholic school. Nowhere is the significance of Catholic schools as contributors to the education of young Americans more apparent than in Philadelphia.

The school system of the Archdiocese of Philadelphia is comprised of more than 300 elementary and secondary schools in Philadelphia and its four surrounding counties (Bucks, Chester, Delaware and Montgomery). These schools provide educational services to over 230,000 children — 75 percent of whom are elementary students. In Philadelphia alone, one out of three children is educated in a Catholic school.

While there is general awareness of the high cost of education, only recently has attention focused on the financial crisis confronting Catholic school systems throughout the nation. Several studies, including one being developed by a panel of the President's Commission on School Finance, have been commissioned to determine the scope of these financial problems. Philadelphia Catholic schools also are faced with serious financial problems. What has been lacking is community awareness of the specific dimensions of these problems.

Purpose

The purpose of this report is to provide the facts about the present and projected financial condition of the Archdiocesan School System. The information developed is intended to:

1. serve as a basis for assessing the magnitude of the financial problem;
2. establish the facts required to promote community awareness;
3. provide the basis needed to formulate and evaluate alternative courses of action which can be recommended to the Archdiocese.

Major Findings

Our analysis covered key educational and financial data from both parish and school sources. Results of our analysis may be summarized as follows:

A. **There is a deficit now.** Analysis of the most recently available data provides new and important insight into the financial condition of parishes and schools in the Archdiocese of Philadelphia. In the fiscal year 1970, all parishes combined operated at a net deficit of $1.2 million. In addition to deficits ex-

ranced in the parishes, separate accounts for the elementary and the secondary schools showed that elementary schools incurred deficits of $193 thousand, while high schools spent $804 thousand more than available revenues. The combined school operation deficit for 1970 was, therefore, $997 thousand. Thus, the total deficit for 1970 incurred by the three operations — parish churches, elementary schools and diocesan high schools — was $2.2 million. During fiscal 1971, the deficit in parish operations alone jumped to $5.1 million, a four-fold increase over 1970. Although complete school financial data is not yet available for 1971, there is every probability that the total deficit will increase, due mainly to the elimination of state aid.

3. **Deficits will continue and will grow during the next several years.** Projections covering the school years 1972-73 (fiscal '73) to 1974-75 (fiscal '75) indicate that by 1975 the cumulative deficit in the schools will reach $55.4 million. That projection represents the deficit resulting from a concatenation of most probable conditions. The deficit could be as high as $84.1 million, or as low as $43.1 million. Deficits projected for the combined elementary and secondary schools appear graphically in Charts I, II and III, respectively.

Chart I

ARCHDIOCESE OF PHILADELPHIA – COMBINED ARCHDIOCESE PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975 ($ MILLIONS)

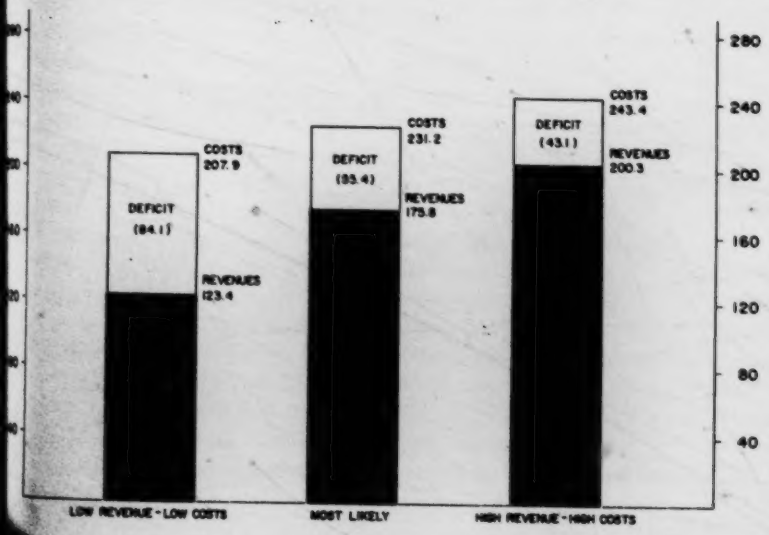


Chart II

ARCHDIOCESE OF PHILADELPHIA – ELEMENTARY SCHOOL
PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 197
($ MILLIONS)

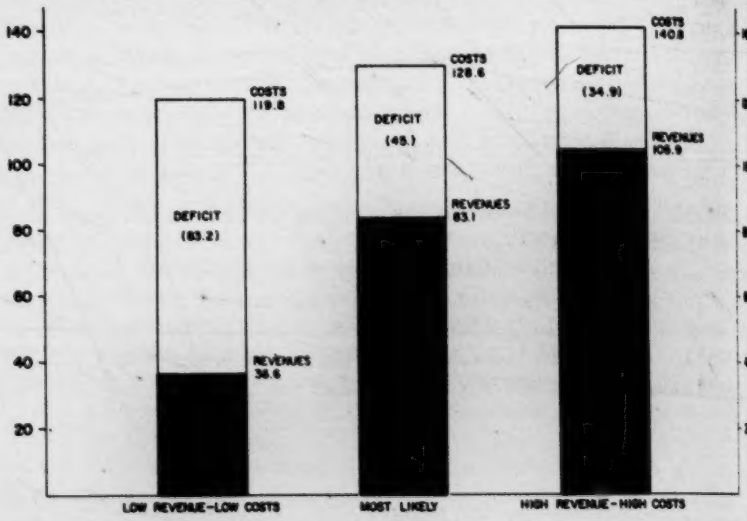
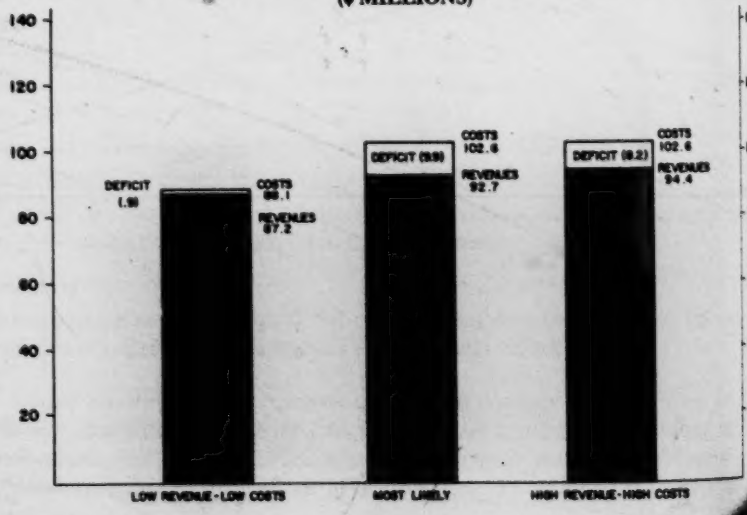


Chart III

ARCHDIOCESE OF PHILADELPHIA – SECONDARY SCHOOLS
PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 197
($ MILLIONS)



Underlying the most likely cumulative deficit of $55.4 million is a $13.5 million deficit during fiscal '73, which rises to $19.0 million during fiscal '74 and climbs to $22.9 million in the school year 1974-75. During these respective years, it is expected that parishes will also be operated at combined cumulative deficits of more than $35 million, creating a projected total church and school operating deficit of $90.4 million.

C. **Revenues will fail to keep pace with costs.** A key factor determining future prospects for Catholic education is, of course, the ability of the church and schools to generate revenues sufficient to keep pace with costs. The cornerstone of the Catholic financial structure is the parishioner contributing through his church. The parish collection is the prime source of revenue funds needed to support the elementary school system, contribute financial support to the secondary schools, and provide for parish needs. Most signs point to a reduced flow of funds from the parishes. Parish revenues, derived mainly from church collections and socials, virtually stopped growing in 1971. Total operating receipts, for the combined parishes of the Archdiocese, increased by less than one percent during fiscal '71. When parish revenues cease to expand, pressures develop in elementary and secondary school budgets. **Nearly 46 percent of all parish revenues are used to support education.** Funding elementary schools takes 33 percent of total parish revenues; another 13 percent of parish revenues is channeled into the high school system from the parishes. At the elementary school level, parish funds represented 76 percent and 67 percent of the total elementary school budget in the years 1970 and 1971, respectively. Obviously, any diminution of the flow of funds through the parishes must have a substantial direct impact on school budgets. The main source of parish revenues (collections, which produce approximately 60 percent of revenues; and socials and donations, which provide another 16.5 percent of total revenues) are not growth-oriented sources. Experience in recent years indicates slower growth in revenues from the parish is likely to continue over the next four years. **If historical contribution rates are adjusted to correct for the effect of inflation, real (or price adjusted) revenues have actually declined in recent years.**

Although recent general economic conditions may account for some decline in contribution rates, evidence suggests that resumption of general economic growth may not yield an upward surge in parish revenues. Analysis of the relationships between average family contributions and average family income indicates that there is a less than proportionate increase in contributions associated with changes in income at higher income levels. The analysis reveals that the average contributor will increase his contribution more if, for example, his income increases from $8,000 to $9,000, than if his income were to increase from $15,000 to $16,000. There is evidence of a diminishing marginal rate of contribution based on income. **Thus, future growth of family income may not be adequate to generate the needed growth in revenues to cover burgeoning costs.**

Combined elementary and secondary school revenues are expected to reach $60.3 million in 1975, expanding at a compound annual rate of growth of 2.4 percent from $56.1 million in 1971-72. These revenues include funds from several sources: parish support and funding, tuitions, student fees and other sources. But projected revenues fall far short of projected costs.

D. **Costs will continue their upward spiral.** School operating costs, especially teacher salaries. have strong upward biases. Several factors reinforce the need to recognize the potential for explosive growth in the costs of maintaining the Catholic school system in Philadelphia. Any list of factors that will push costs up must include:

1. **Rising teacher salaries**—teacher salaries in Philadelphia Catholic schools are below national parochial averages. Additionally, unionization of lay elementary teachers and a movement toward an established level of parity even with Catholic secondary salary scales would exert heavy financial pressure on the school system. Further movement in the direction of parity of both Catholic elementary and secondary salaries to public school salary levels would create an added strain on the financial resources of the school system. Any one, or a combination, of these factors occurring would result in substantial cost increases in the operation of the schools.

2. **Declines in the availability of religious teachers**—inability to provide religious teachers to instruct in the schools would prove extremely costly in Philadelphia. The inability of the school system to avail itself of religious teachers (at relatively low salary costs) may arise because of either a lack of numbers of persons entering the teaching religious orders or by the orders themselves changing their mission. Declining ratios of religious to lay teachers translate directly into significantly higher costs — often a doubling of teacher salary costs. The availability in Philadelphia of a few large religious orders committed to teaching is both an advantage and a disadvantage: an advantage in that they lend an element of stability to costs; a disadvantage in that a decision on the part of any one order to change its mission would have a huge impact on salary costs and be a major destabilizing force. Presently, there are no indications of major shifts occurring in the missions of the large religious orders which support education in Philadelphia. However, a declining religious/lay teacher mix can be anticipated, especially in the high schools. As a result, total teaching costs will accelerate more rapidly than might normally be expected.

3. **Improving (declining) student/teacher ratios lead to higher costs** — student/teacher ratios represent one observable variable that may, rightly or wrongly, be interpreted as a measure of quality. It may serve thus as a measure of perceived quality. Further improvement in the student/teacher ratio in Catholic schools and the concomitant increased cost pressures associated with the reductions are anticipated.

Despite all these pressures, costs in the Catholic schools will remain substantially below the public school system when measured on the basis of cost

per student. To illustrate the gap, the cost per student in Archdiocesan schools projected for the year 1975 is $478 per student. Contrast this with the current cost (1971-72) of $1,027 per student in Philadelphia public schools which was estimated by the Federal Reserve Bank of Philadelphia.

E. **Not all schools are operating in the red.** As indicated by analysis of individual school operating statements, there are many schools which are not experiencing deficits currently. Although there is a substantial deficit overall, resulting from the fact that costs are rising at rates approximately three times as fast as revenues, this deficit is not distributed proportionately or evenly over all the schools.

F. **Catholic school enrollments declined in the last several years. Enrollment declines are projected to continue through 1975 and will add substantially, on balance, to the operating costs of the school districts in Philadelphia and surrounding counties.** The net additional cost depends upon projected rates of transfer from the Catholic to the public schools and the effect transfers will have on the amount of aid provided by the state. The cumulative impact over the three year projection period, assuming the rate of transfer implied in the basic forecast (5.7 percent compound annual rate), involves net additional costs in Philadelphia of $20.9 to $29.8 million. Additional costs for the four-county suburban area would be $24.4 million.

If the Catholic schools were to close down at the end of this year (1971-72), and all students were shifted to the public schools, the cumulative additional costs to 1975 would be: Philadelphia — $378.8 to $471.2 million; in the four-county surrounding area, the cost would be $274.8 million. Closing down all schools in the Catholic Archdiocese, therefore, would add an additional $653.6 to $746.0 million in total to operating costs over the next three years in the Philadelphia five county area.

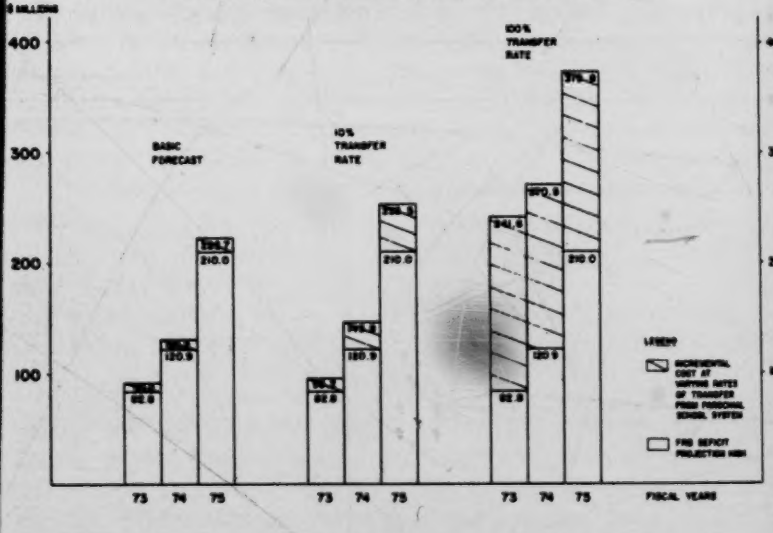
Assuming a longer-term closing pattern, 10 percent per year transfer, additional costs to the public school system in the time period 1972-73 to 1974-75 would be between $140.8 and $157.5 million. This amount is net of state aid, that is, the additional costs have been adjusted to reflect the fact that transfer of students may generate additional state-aid money for the receiving school districts.

Transfer of students from Catholic to public schools may have a beneficial effect on the financial status of the public schools in that state aid may increase. Within the mechanics of the state-aid ratio, it is possible for the state-aid ratio to rise, yielding higher state aid for not only the additional students but for the total receiving student body as well. But full benefits of transfer-induced state aid are not accrued until three years after the transfers occur. Thus, for example, if the Catholic schools were to close in '72, the public schools would receive no additional state aid in 1972-73, only a partial increase in aid in 1973-74, and the full impact in 1974-75 because of the manner in which state aid is calculated.

Comparison of the cost impact of various assumed rates of student transfer

on projected public school deficits is revealing. Shifts of enrollment to public schools in Philadelphia may add between $8.1 to $12.7 million to the public school deficits projected by the Federal Reserve Bank of Philadelphia, if the Basic Forecast proves accurate. Higher rates of transfer will involve, of course, higher additional costs. Immediate closing of Catholic schools (at the end of the 1971-72 school year) would add $158.0 to $162.8 million per year to the public school deficit projected by the Federal Reserve Bank of Philadelphia. A visual comparison of the effects of different assumed rates of transfer on costs is provided in Chart IV.

Chart IV
COMPARISON OF THE COST IMPACT ON PROJECTED PUBLIC SCHOOL DEFICITS OF ALTERNATE RATES OF TRANSFER FROM PHILADELPHIA PAROCHIAL SCHOOL



G. **Tuitions may provide a prime source of additional revenue to schools in the Archdiocese if, in fact, the Catholic community of Philadelphia continues to desire a viable parochial system.** There is no evidence of a strong relationship between changes in tuitions (or student fees as proxy tuitions) and declines in enrollment. To the contrary, evidence to date, and at the levels of tuitions now charged, seems to indicate that the demand for Catholic school education is insensitive to current tuition levels—which is not to say that future demand may not be. The recent increase in high school tuitions in the Archdiocese from $130 per year to $300 per year is outside the range of any prior experience here — real or statistical. It is too early to determine the full impact of that price rise on enrollments, but so far the effect appears minimal.

evidence, however, in the City of Philadelphia that direct charges (tuitions or student fees) in elementary schools are being paid for by an approximately equal reduction in church collections. This means that total support of the parish church-school complex is not likely to change level significantly — rather, parents will redistribute their giving, channeling funds directly into the school budget, by-passing the collection plate.

H. **Management information processes and systems are inadequate.** There is need for development of necessary information and systems for management analysis and control. Presently, ability to cope with the assessment of problems in a rapidly changing financial situation is limited. High levels of demand for sound financial and other key information are likely to be made upon the Archdiocese as the dynamics of the current financial crises unfold. Hard choices are ahead and they require hard information to manage either controlled balanced growth or decline. The current crisis does not appear to have reached the all or nothing stage. **There are options to explore.**

Perspective

The financial crisis pressing on the Archdiocesan schools, supporting parishes, and parishioners, is typical, in many ways, of the problem facing dioceses throughout the United States. In some places, the stage of the problem is more advanced — the communities involved have made their choice of how to solve the problem. Other communities are barely perceiving the existence of the problem. In Philadelphia, the problem is here and now. The time for learning the facts and making the choices is now. For the Catholic community, the time has always been now. There is, however, a new factor — a growing community awareness of the financial crisis facing non-public education, most significantly Catholic schools.

Many proposals for aid are now being discussed at the federal and state levels. There is, for example, **The President's Commission on School Finances,** including "The Panel on Non-Public Education." In Pennsylvania, there is the Mullen legislation for school aid. Legal and constitutional questions are by no means settled. There is considerable discussion about methods to finance education generally — tax credits, value-added taxes, and non-property tax bases. Many solutions have been proposed to deal with the problem facing Catholic education, and the sheer economics of education range from closing down all Catholic schools immediately, to limited consolidation or other forms of managed decline, to constructive cooperative programs between Catholic and public school officials. These programs include such cooperative efforts as shared-time, dual enrollment, programs or released time for religious education.

Summary

This Committee now has with this report:

The facts necessary to analyze and assess the financial crisis confronting the Archdiocese of Philadelphia school system.

2. A data base to determine and evaluate alternative courses of action recommendation to the Archbishop of Philadelphia.

3. Information required to assess the impact of the financial problems of the Archdiocesan school system on the Philadelphia community and local public finance.

What is not available is an in-depth understanding of the attitudes of the Philadelphia area Catholic community. Attitudes reported from other parts of the country may or may not be representative of the attitudes of the Philadelphia community. To fill that gap and provide the correct perspective, a systematic program aimed at determining the basic attitudes of the Catholic community in the Archdiocese of Philadelphia must be pursued.

HE ARCHDIOCESAN DVISORY COMMITTEE N THE NANCIAL CRISIS OF ATHOLIC SCHOOLS IN HILADELPHIA AND URROUNDING COUNTIES

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Chairman of the Board, Continental Bank

Rafsky, William L.
Executive Director,
Greater Philadelphia Movement

Riesenbach, E. Gerald
President, The Philadelphia Jaycees

Ross, William
President, Philadelphia Board of Education

Scott, Isadore M.
Civic Leader

Simpson, Charles G.
Former Vice President, UGI Corporation

Tegler, Albert W., Mrs.
Prominent Catholic Laywomen

Toohey, Edward F.
President, Philadelphia Council AFL-CIO

Valente, William D., Esquire
Professor of Law, Villanova University

Van Dusen, Lewis H., Jr., Esquire
Drinker, Biddle and Reath

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INTRODUCTION.

This Supplemental Brief is filed by appellants pursuant to Supreme Court Rule 41(5) to bring to the attention of this Court recently discovered facts concerning related litigation now pending between the Philadelphia-Montgomery Christian Academy (the "Academy") and education officials of the Commonwealth of Pennsylvania, all of whom are defendants-appellees in the instant case. This related litigation, captioned *William Viss, et al. v. John Pittenger, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.*, E. D. Pa., Civ. Action No. 72-332, arose out of the Commonwealth's decision—communicated to the Academy on July 29, 1970, a year before this Court's ruling in *Lemon v. Kurtzman*, 403 U. S. 602 (1971)—to declare the Academy and certain other nonpublic schools ineligible for further state aid under Pennsylvania Act 109.

The Academy filed suit on February 15, 1972 to reverse that determination, but it was not until July 14, 1972, nine days after appellants submitted their Brief to this Court in the case at bar, that an opinion of record was issued by the District Court in dismissing the Complaint.[1] Indeed, counsel for appellants was not informed even of the existence of this related litigation until October 18, 1972. An appeal therein is now pending before the United States Court of Appeals for the Third Circuit, No. 72-1807.

This litigation bears significantly on the instant appeal because it illustrates—perhaps more effectively than hypothetical argument—two of the major propositions here advanced by appellants: first, that further disbursements of

1. Copies of the relevant documents of record in the *Viss* case, consisting of the Complaint, defendants' Motion to Dismiss or, in the Alternative, to Stay All Proceedings, and the Memorandum and Order of the District Court dated July 14, 1972, are attached hereto as Exhibits "A", "B" and "C", respectively.

public funds to sectarian schools under Pennsylvania Act 109 will inevitably promote the very entanglement between church and state which this Court forbade in holding Act 109 unconstitutional on its face, and second, that the so-called "contracts" signed by the schools to obtain reimbursement for "services" rendered prior to the decision of this Court in *Lemon* do not furnish any basis for additional disbursements.

The relevant facts are these, as disclosed by the pleadings attached hereto: Act 109 was adopted on July 19, 1968. Rules and regulations for implementing the Act were not issued until December, 1968.[2] Thereafter the Academy and other nonpublic schools entered into "contracts" with the state to receive payments under the Act for "services" rendered during the 1968-69 school year. Under Act 109 those payments were made to the Academy and the other schools in the following school year, commencing in September 1969.

The Academy then executed another "contract" with the Commonwealth to provide reimbursement for "services" rendered in the 1969-70 school year. On July 29, 1970—*after all of the 1969-70 "services" had been provided by the Academy pursuant to the "contract"*—the Commonwealth's Department of Public Instruction announced to the Academy that no further payments would be made, even in respect of the completed 1969-70 school year, because the Academy's By-laws and public brochures contained a reference to God's revelation and creation as affecting its teaching. Despite the Academy's repeated efforts to persuade

2. In fact, the regulations were not formally approved until January 14, 1969. Applications could not even be solicited until after that time. This delay in implementing the statute accounts for the fact that plaintiffs did not file suit challenging the constitutionality of Act 109 until July 3, 1969. Had the complaint been filed much before then, it would have been open to challenge as premature because no funds had yet been committed for payments under Act 109.

the Commonwealth that its decision was erroneous, and that every Catholic parochial school in the state of Pennsylvania would be rendered ineligible for aid under the standard applied to the Academy, the decision of the Commonwealth was not reversed.

The Academy and several tax paying parents of children enrolled at the school thereupon commenced a class action on behalf of the Academy and all other similarly situated schools, seeking (a) to convene a three-judge court to consider alleged constitutional claims; (b) to enjoin all further payments under Act 109 until the rights of the class had been determined; and (c) to require the state to "reinstate the contract" with the Academy. On April 14, 1972, defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted or, in the alternative, for a stay pending the decision of this Court in the instant appeal.

On July 14, 1972, the District Court (per Troutman, J.) dismissed the complaint, holding that (1) there was no need for a three-judge court because this Court had already held Act 109 unconstitutional on its face, (2) the plaintiffs had no "contract" with the state in respect of "services" provided during the 1970-71 school year and therefore could not claim that any expenditures had been made in reliance on such a contract, and (3) the court was powerless to order an administrative hearing on the Academy's claim because this would foster the very entanglement proscribed by this Court in *Lemon*. In conclusion, the District Court suggested that the issue raised by the Academy should have been earlier presented in the instant litigation before Act 109 was declared invalid. Significantly, however, the District Court did not even mention the Academy's claim to reimbursement for "services" rendered in the 1969-70 school year—a year for which the school *had* executed a "con-

tract" with the state and fully performed "services" thereunder.[3]

3. Paragraph 14 of Exhibit "A", attached hereto.

ARGUMENT.

A. Further Disbursements Under Act 109 Will Promote Church-State Entanglement.

The troublesome issues raised raised by the *Viss* case validate the perception of this Court in *Lemon* that state aid to sectarian schools under Act 109 necessarily involves church and state in a relationship detrimental to both. But more important for the present appeal, the case also illustrates why the prior ruling in *Lemon* cannot obviate continuing constitutional difficulties if further disbursements are to be made under the Act.

Appellants have argued that $24 million cannot—consistently with this Court's decision in *Lemon*—be dispensed to 1,181 nonpublic schools without careful appraisal of the exact degree of religious involvement in the administration, curriculum and operation of each institution. Such scrutiny, it is suggested, will unavoidably involve entanglement. Appellees have responded that this suggestion is fanciful because the 1970-71 school year is over and

> "the Commonwealth, in determining a school to be eligible for reimbursement, must be conclusively presumed to have made a determination that such school in no wise violated the statutory and constitutional obligation of secularity of instruction." (Brief for Commonwealth of Pennsylvania and Appellee Schools, p. 20).

The *Viss* case, however, casts a somewhat different light on the matter. The Director of the Commonwealth's Office for Aid to Nonpublic Education, Vincent McCoola, has simply excluded—without any administrative hearing—a number of nonpublic schools on the apparent basis of a

sentence or two in the by-laws and public brochures of those institutions. Such an administrative approach scarcely meets the concerns which underlay this Court's decision in *Lemon*. In light of *Viss*, and the absence of any rebutting evidence whatsoever from the Commonwealth on this point, it simply cannot be presumed conclusively that the state has done all that needs to be done to ensure that public funds will not be used for unconstitutional purposes. On the contrary, it appears that state funds may be disbursed without any meaningful inquiry—either before or after the *Lemon* ruling—to insure that religious teaching and practice will not be subsidized.

Nor does the problem end there. As the District Court recognized in *Viss*, there is absolutely no way to set up an administrative review of the state's decision to declare the Academy ineligible for aid, without thereby promoting the most egregious form of unlawful entanglement; i.e., governmental scrutiny of the school's curriculum, philosophy and practice to determine if certain subjects were taught in a truly secular manner. The apparent injustice resulting to the Academy from the state's arbitrary decision is only compounded by permitting wholesale disbursement of funds to other schools which—as appellees' counsel would be the first to recognize—are equally ineligible for state aid under the standard invoked by the Commonwealth to exclude the Academy.

There is only one satisfactory solution to all of these vexing difficulties: full prospective compliance with the mandate of *Lemon*. Act 109 has been found unconstitutional on its face and all further subsidies thereunder to any sectarian schools should be prohibited.

B. The Commonwealth of Pennsylvania Has, by Its Own Conduct, Established That the So-Called "Contracts" Do Not Justify Further Disbursements Under Act 109 to Sectarian Schools.

The Brief filed in this Court on behalf of the Commonwealth of Pennsylvania devotes eight pages to the proposition that the Commonwealth has entered into a true and binding contractual relationship with sectarian schools, a relationship which it is said the Commonwealth must now honor by making further disbursements to the schools under Act 109 (Brief, pp. 11-18). Once again, the argument is undercut by the facts disclosed in the *Viss* case.

As stated above, the Academy entered into a "contract" with the Commonwealth to perform reimbursable "services" during the 1969-70 school year. On July 29, 1970, long after the performance of those "services", the Commonwealth unilaterally announced that payments would not be made for the 1969-70 school year or thereafter. Nothing was said about the sanctity of "contract", or the prior good faith "reliance" by the Academy on subsequent reimbursement. Nor has the Commonwealth altered its position to this day.

In evaluating the true effect and meaning of a legislative arrangement—no less than in judging the conduct of a nation's foreign affairs—it is instructive to watch what a government does, not what it says. The earlier actions of the Commonwealth in the *Viss* case speak far louder than its words in the case at bar. The action of the Commonwealth in cutting off further payments to the Academy after July 29, 1970, even in respect of "services" already performed, is utterly inconsistent with any notion of contractual or equitable obligation. But it *is* consistent with the view expressed by this Court in *Lemon*: the payments under Act 109 are straightforward governmental subsidies

which can and should be terminated whenever it is found that the payments, or the entire scheme for administering them, are constitutionally defective. Appellants submit that this Court should accord no more weight to the Commonwealth's claim of "contractual obligation" than has the Commonwealth itself in denying funds to the Academy. Manifestly, these "contracts" do not warrant any circumvention of the normal prospective effect to be accorded the ruling of this Court in *Lemon*.

CONCLUSION.

For all of the foregoing reasons, the Order of the lower court should be reversed insofar as it permits the further disbursement of any funds, under and pursuant to Act 109, to any religious or church-related school.

Respectfully submitted,

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EXHIBIT "A".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-332.

WILLIAM VISS, FRANK HAMEL, JR., JOHN J. MITCHELL, AND PHILADELPHIA-MONTGOMERY CHRISTIAN ACADEMY

v.

JOHN PITTINGER, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, AND VINCENT McCOOLA, AS DIRECTOR, OFFICE FOR AID TO NONPUBLIC EDUCATION

COMPLAINT.

I. STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. Section 1343(3) and (4) as this is a suit in equity authorized by 42 U. S. C. Section 1983 to redress the deprivation under color of law or [*sic*] rights, privileges and immunities secured by the Constitution and laws of the United States, and is also invoked pursuant to 28 U. S. C. 2281, 2284, 2201, 2202, and 1331(a).

II. NATURE OF ACTION.

2. This is a class action seeking to enjoin the Defendants from making any further payments under or pursuant

to Act 109 (Act of June 19, 1968) to any school until the rights of Plaintiff institution and all others similarly situated have been determined by your Honorable Court, and to protect Plaintiff individuals and all others similarly situated in their freedom of expression and to redress the deprivation under color of law of rights, privileges and immunities secured by the Constitution and laws of the United States of all Plaintiffs.

3. Philadelphia-Montgomery Christian Academy is a party Defendant in the related case of Lemon v. Kurtzman, No. 69-1206, before your Honorable Court.

III. Parties.

4. Individual Plaintiffs are citizens of the United States of America and of the Commonwealth of Pennsylvania; are residents of the Eastern District of the United States Federal Court District in Pennsylvania; and are tax payers of Federal and State taxes. All of the individual Plaintiffs are parents of pupils in Philadelphia-Montgomery Christian Academy.

5. Philadelphia-Montgomery Christian Academy is a Pennsylvania Non-profit Corporation situate and operating within the Eastern District of Pennsylvania, carrying on a private school with grades from kindergarten through twelve, and satisfies the requirements of the compulsory education law of the Commonwealth of Pennsylvania, and is approved by the Private Academic Board of the Commonwealth of Pennsylvania. Philadelphia-Montgomery Christian Academy is bringing this action on its own behalf and on behalf of all other schools similarly situated pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

6. Defendant, John Pittinger, is Superintendent of Public Instruction of the Commonwealth of Pennsylvania

and is sued herein in that capacity. Defendant, Grace Sloan, is State Treasurer of the Commonwealth of Pennsylvania and is sued herein in that capacity. Vincent McCoola is Director, Office for Aid to Nonpublic Education.

IV. Factual Allegations.

7. On June 19, 1968, the Governor of the Commonwealth of Pennsylvania signed into Law Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, effective July 1, 1968, hereinafter referred to as the Act. The Act empowered the State Superintendent of Public Instruction to contract for the purchase of secular educational services from non-public schools located in the Commonwealth of Pennsylvania and authorized him to promulgate rules and regulations to effectuate this purpose.

8. In December, 1968, the Defendant, David H. Kurtzman, (predecessor of John Pittinger) in his capacity as State Superintendent of Public Instruction of the Commonwealth of Pennsylvania and acting pursuant to the authority of the Act, issued Rules and Regulations for the effectuation of the purposes of the Act.

9. Philadelphia-Montgomery Christian Academy, together with such other schools as, but not limited to, William Penn Charter, St. Anthony's Roman Catholic School, Archbishop Wood's Girl's High School, Cardinal Dougherty, entered into a contract with the State pursuant to said Act.

10. The State Superintendent of Public Instruction approved for payment various amounts to contracting schools, including Philadelphia-Montgomery Christian Academy, and payment thereon was made by the Commonwealth.

11. During the year 1969 an action was filed with Your Honorable Court entitled Lemon v. Kurtzman, No. 69-1206, seeking to have the Act declared unconstitutional. In that action, Philadelphia-Montgomery Christian Academy was one of seven named schools joined as Defendants.

12. Your Honorable Court found the Act to be constitutional, 310 F. Supp. 35, and the Supreme Court of the United States reversed on June 28, 1971.

13. Further proceedings were held before your Honorable Court wherein an Order was entered December 28, 1971, enjoining Defendants herein from paying funds pursuant to Act 109 for services performed after June 28, 1971, "to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose". Plaintiff in said case has appealed from that Order.

14. On July 29, 1970, the Department of Public Instruction informed Philadelphia-Montgomery Christian Academy that "your institution is not entitled to compensation for services rendered under said Act", thereby avoiding the contract entered into between Philadelphia-Montgomery Christian Academy and the Department of Public Instruction for the school year 1969-1970.

15. The decision of the Department of Public Instruction was made without any hearing or opportunity for Philadelphia-Montgomery Christian Academy to be heard, and without explanation of the grounds of such decision.

16. An identical letter was sent to the Middletown Christian School under the same date as that sent to Plaintiff.

17. Thereafter, Plaintiff's chief executive officer was informed orally on September 29, 1970, by Vincent J. Mc-

Coola, Director of Office for Aid to Nonpublic Schools, that all independent protestant Christian Schools, such as Plaintiff, were not to be compensated under the Act because it was "not possible for such schools to comply with the Act". Further, Mr. McCoola stated that Plaintiff had "existed without aid before Act 109 and I see no reason why it needs aid now".

18. Plaintiff school was informed by the Director of the Office for Aid to Nonpublic Schools, under date of November 10, 1970, that its by-laws must be changed to eliminate any reference to God's revelation and creation as affecting its teaching, that its public brochures must eliminate any such references and specifically indicate that its subjects are taught so that "secularity is definitely maintained by your institution".

19. Plaintiff avers that it complied with Act 109 without making the changes requested by the Defendant through the Office for Aid to Nonpublic Schools.

20. Plaintiff and other institutions similarly situated were singled out for treatment distinct from William Penn Charter, Episcopal Academy, Cardinal Dougherty, Archbishop Wood's High School for Girls, and other nonpublic schools who carry on education in accordance with its individual philosophy in an identical manner to Plaintiff.

21. Despite the Encyclical of Pope Pius XII, in his 1925 Encyclical on the Christian Education of Youth, which declares authoritatively that "it is necessary that all teaching and the whole organization of the school, and its teachers, syllabus, and textbooks in every branch, be regulated by the Christian (i.e. Catholic) spirit under the direction and maternal supervision of the Church; . . . and this in every grade of school, not only the elementary, but the intermediate and higher institutions of learning as well.

'For it is necessary', if we may use the words of Leo XIII (Enc. Militantis Ecclesiae, 1897) not only at certain hours to teach Catholic religion to children but that every other subject be permeated with Christian piety", Catholic schools, such as Cardinal Dougherty and hundreds of others, have continued to be permitted to enter into contracts with Defendant, whereas Plaintiff has, since July of 1970, been refused such equal treatment.

22. All of the individual Plaintiffs state that the actions of the Superintendent of Public Instruction are repugnant to and in violation of the rights of Plaintiff insofar as they infringe upon Plaintiff's rights of freedom of expression, freedom of education, equal protection of the laws, due process of law and other constitutional rights afforded them.

23. The selective benefit dispensing policies of Defendant Superintendent of Public Instruction in the matter of the administration of funds allocated to nonpublic schools constitute an abridgment of Plaintiff institution's rights and privileges and individual Plaintiff's rights and privileges.

24. The selective benefit dispensing policies of Defendant Superintendent of Public Instruction under the Act advances non religion over religion, and has as its primary purpose and effect the advancement of one religion over all other religions.

25. The Act as applied violates the Fourteenth Amendment to the United States Constitution in that it constitutes a denial of the equal protection of the law and the free exercise of religion.

IV. Other Allegations.

26. This suit involves a genuine case or controversy between the Plaintiffs and the Defendants.

27. The Plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

WHEREFORE, the Plaintiffs pray that the following relief be granted:

A. That a three-judge Court be convened as provided in Title 28, Sections 2281 and 2283 of the U. S. Code to declare unconstitutional the Pennsylvania Nonpublic Elementary and Secondary Education Act as applied by the Defendant State Superintendent of Public Instruction and the Defendant State Treasurer.

B. That the Defendant State Superintendent of Public Instruction be enjoined from approving the payment of any funds under the Act or otherwise participating in its administration, and the Defendant State Treasurer be enjoined from paying any funds pursuant to the Act until the rights of Plaintiff institution and all other institutions similarly situated have been determined.

C. That the Defendant State Superintendent of Public Instruction be enjoined from depriving Plaintiffs under color of law of the rights, privileges and immunities granted to them by the Constitution and the laws of the United States.

D. That the Defendant State Superintendent of Public Instruction be ordered to reinstate its contract with Philadelphia-Montgomery Christian Academy and all other institutions similarly situated for purchase of services pursuant to Act 109 from 1969 to June 28, 1971; and distribution of Act 109 funds include Plaintiff and such other schools.

E. That a preliminary injunction pending the trial of the issues be granted to the Plaintiffs against the Defendants for the relief set forth herein.

F. That the Plaintiffs be granted such other and further relief as the Court may deem just and proper.

SEMISCH AND DERMOVSESIAN,

By: DONALD SEMISCH,
Counsel for Plaintiff.

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Attorneys at Law,
408 North Easton Road,
Willow Grove, Pennsylvania. 19090

EXHIBIT "B".

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-332.

WILLIAM VISS, FRANK HAMEL, JR., JOHN J. MITCHELL, AND PHILADELPHIA-MONTGOMERY CHRISTIAN ACADEMY,
Plaintiffs

v.

JOHN PITTENGER, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, AND VINCENT MCCOOLA, AS DIRECTOR, OFFICE FOR AID TO NONPUBLIC EDUCATION,
Defendants

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ALL PROCEEDINGS.

AND Now, this day of April, 1972, defendants, John Pittenger, Secretary of Education of the Commonwealth of Pennsylvania, Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania and Vincent McCoola, Director of the Office for Aid to Nonpublic Education, by their attorneys, respectfully move the Court as follows:

1. To dismiss the complaint:

(a) for lack of jurisdiction over the subject matter;

(b) for failure to state a claim upon which relief can be granted;

or

2. To stay all proceedings in this Court and abstain from further action and consideration of this matter until the United States Supreme Court, in the case of *Lemon et al v. Kurtzman et al,* (appeal filed January 11, 1972; District Court Civil Action No. 69-1206), has decided whether those church related schools having contracts with the Commonwealth of Pennsylvania under the Nonpublic Elementary and Secondary Education Act, 42 P. S. § 5601-5609 may be reimbursed for services performed or costs incurred subsequent [*sic*] to June 28, 1971.

Movants respectfully request that they be allowed to present oral argument in support of their motion.

Respectfully submitted,

J. SHANE CREAMER,
Attorney General,
J. JUSTIN BLEWITT, JR.,
Deputy Attorney General,
Attorneys for Defendants.

State Capitol
Harrisburg, Pa.

EXHIBIT "C".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-332.

WILLIAM VISS, FRANK HAMEL, JR., JOHN J. MITCHELL, AND PHILADELPHIA-MONTGOMERY CHRISTIAN ACADEMY

v.

JOHN PITTENGER, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, AND VINCENT MCCOOLA, AS DIRECTOR, OFFICE FOR AID TO NONPUBLIC EDUCATION

MEMORANDUM AND ORDER.

TROUTMAN, *J.* July 14, 1972

On June 19, 1968, the Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 P. S. § 5601 et seq. (Supp. 1969), [the Act], providing state aid to nonpublic schools for teachers' salaries, textbooks and instructional materials, was signed into law. Under the statutory scheme, the State Superintendent for Public Instruction was empowered to enter into contracts with nonpublic schools for the purchase of "secular educational services". Thereafter, the Superintendent promulgated rules and regulations and entered into contracts with the state's nonpublic schools, including Philadelphia-Montgomery Christian Academy, the present plaintiff. Philadelphia-Montgomery Christian Academy is allegedly a private school, operated by a board

of directors elected by the parents of the students. Plaintiffs aver that the school is not under the jurisdiction of any church or religious organization. On July 29, 1970, the State notified plaintiff school that it was "not entitled to compensation for services rendered under said Act" and, consequently, declared its contract null and void. The ostensible basis for the termination of plaintiff's contract was the reference in the institution's by-laws and brochures that God's revelation and creation affected its teaching. Therefore, the ground for the invalidation of the contract was, in essence, that the school's secular teaching was permeated with religious thought. Subsequently, on June 28, 1971, the Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), held the Act unconstitutional on its face, on the ground that the statute fostered an excessive governmental entanglement with religion. 403 U. S. at 614. On remand, this Court entered summary judgment for the plaintiffs and enjoined any payment to nonpublic schools under the Act for services performed or costs incurred subsequent to June 28, 1971.

In their complaint, plaintiffs allege that they have been deprived of rights, privileges and immunities secured by the Constitution in that: (1) the Act has been unconstitutionally applied to them, denying them their right to equal protection of the law and the free exercise of religion and (2) they were deprived of their right to due process of law under the Act in that their contract was terminated without a hearing. Plaintiffs seek to convene a three-judge court pursuant to 28 U. S. C. § 2281 to declare the Act unconstitutional as applied to plaintiffs, to enjoin the payment of funds under the Act to nonpublic schools for services performed and costs incurred prior to June 28, 1971, and to require the State to reinstate the contract with plaintiffs. Before the Court is the Commonwealth's motion to dismiss the complaint.

Initially, we must consider plaintiffs' application to convene a three-judge court. The manifest purpose of Section 2281 is to prevent a single judge from improvidently invalidating or enjoining as unconstitutional a statute embodying important state legislative policy. *Phillips v. United States*, 312 U. S. 246 (1941). In *Lemon*, the Supreme Court held this very Act unconstitutional on its face. Thus, the purpose of Section 2281 would not be served in this case. Clearly, the statute does not contemplate that another three-judge court determine the constitutionality of the Act on other grounds. Moreover, since the Act has already been held unconstitutional on its face, we conclude that the plaintiffs' claim that the Act is unconstitutional as applied is manifestly insubstantial and, therefore, does not support the jurisdiction of a three-judge court. *Swift & Co. v. Wickham*, 382 U. S. 111, 115 (1965). Accordingly, plaintiffs' application for a three-judge court will be denied.

On December 28, 1971, we entered summary judgment for plaintiffs in Lemon and enjoined payments for services performed and costs incurred subsequent to June 28, 1971. The gravamen of plaintiffs' claim is that they were deprived of their contract with the State without a hearing and, therefore, denied due process of law. The ultimate relief which plaintiffs seek is the reinstatement of their contract, entitling them to receive payment for expenditures made prior to June 28, 1971. On remand, we were faced with the issue in *Lemon v. Kurtzman*, — F. Supp. —, (E. D. Pa. 1972) whether the Supreme Court's determination of the Act's unconstitutionality was to be applied retroactively, thereby precluding payments to nonpublic schools for services rendered prior to June 28, 1971. We concluded that in order to prevent hardship and injustice to the nonpublic schools who in reliance on their contracts

with the State had already performed the services and made the expenditures required by such contracts, the Supreme Court's decision would be given prospective application, thereby permitting reimbursement for the school year 1970-1971. In the instant case, plaintiffs had no contract for the school year 1970-1971, have alleged no expenditures in reliance on any contract, and suffered no hardship by reason of the Supreme Court's decision holding the Act unconstitutional. Even assuming arguendo, that plaintiffs were deprived of their contract without a hearing, the necessary elements of expenditures, reliance and hardship are lacking. We find it impossible, on any theory, to justify payments under an act now declared unconstitutional on its face, to one, who had no contract thereunder, made no expenditures in reliance thereon and, therefore, suffered no hardship by reason of the Supreme Court's decision. To do otherwise would defeat the purpose and rationale of our decision; i.e., to prevent hardship or injustice to those schools which actually made expenditures in justifiable reliance on an act held valid at the time, but subsequently declared unconstitutional.

Moreover, this Court lacks the power to order defendant to reinstate plaintiffs' contract. The only feasible relief which could be afforded to plaintiffs would be to order that a hearing be held by the State to determine whether they, in fact, did qualify for reimbursement under the Act. To do so, however, would run afoul of the Supreme Court decision in that the State would be compelled to determine whether the school is a religious or non-religious institution and, thereby, foster the very entanglements which the Court sought to avoid. Philadelphia-Montgomery Christian Academy was a named defendant in the original action in *Lemon v. Kurtzman*, 310 F. Supp. 35 (E. D. Pa. 1969) and continued in that capacity throughout the duration of

the litigation. It was at that time, rather than subsequent to an adverse decision by the Supreme Court, that this present issue should have been raised. Accordingly, defendants' motion to dismiss the complaint will be granted.

ORDER.

And Now, this 14th day of July, 1972, It Is Ordered that plaintiffs' application to convene a three-judge court is Denied. It Is Further Ordered that defendants' motion to dismiss the complaint is Granted.

E. Mac Troutman, *J.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1470

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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SUPPLEMENTAL BRIEF FOR COMMONWEALTH OF PENNSYLVANIA

ARGUMENT

Appellants, on October 31, 1972, have filed a Supplemental Brief which now calls the attention of the Court to the case of *Viss* v. *Pittenger,* — F. Supp. — (E.D., Pa., July 14, 1972, Civil Action No. 72-332).

The record in that case is not before this Court, and questions going to the merits of that case can scarcely be reviewed here.

Appellants seek to use the *Viss* case as a basis for their claim that, if this Court affirms the lower court's

decision that the payments to the schools be made, somehow that will give rise to forbidden entanglements. Secondly, Appellants say that the *Viss* case proves that the schools do not have genuine contracts with the Commonwealth.

The District Court opinion correctly notes that payments for 1970-1971, according to the statute, could be made only to schools having contracts, and that the Philadelphia Montgomery Christian Academy had no contract. The Commonwealth could not have entered into a contract with the Academy for the year in question because of our previous determination that the Academy had failed to meet other requirements of the Act. The substance of those requirements, and the merits of our determination, were never reached by the District Court in *Viss* and cannot be gone into by the Supreme Court in the instant case.

The Appellants, however, aver that the Commonwealth's basis for its original denial of qualification to the Academy was the Academy's alleged breach of the "secular function" requirements of the Act. Assuming, *arguendo,* that such was the basis, Appellants prove exactly what we have said: namely, that we had already made a determination that any given school did, or did not, meet such requirements, the result being (as we had stressed) that *"the state has long since discharged its function with respect to them", and no entanglement whatsoever can now result from the making of the payments.* Appellants point to nothing in the record of the instant case to show that the determinations in question were not made, and indeed the *Viss* case plainly shows that they were made.

Nor does the *Viss* decision aid Appellants in their assertion that no genuine contracts are herein involved. The District Court therein plainly considers that our contracts with the nonpublic schools, under Act 109, are real, legally binding contracts. It says that the very reason why the Academy could not get paid for that year is that they *"had no contract* for the school year 1970-1971".

Finally, the District Court, in *Viss,* strongly re-emphasizes why the payments, for 1970-1971, should now be made to all qualifying nonpublic schools:

> "We concluded that in order to prevent hardship and injustice to the nonpublic schools who in reliance on their contracts with the State had already performed the services and made the expenditures required by such contracts, the Supreme Court's decision would be given prospective application, thereby permitting reimbursement for the school year, 1970-1971."

CONCLUSION

The Appellants, by their Supplemental Brief, have raised an extraneous argument which, if of any value here, actually supports the position of the Commonwealth.

Respectfully submitted,

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State Capitol
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David H. Kurtzman, et al.,
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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 71-1470. Argued November 8, 1972—Decided April 2, 1973

Following this Court's invalidation in *Lemon* v. *Kurtzman*, 403 U. S. 602 (*Lemon I*) of Pennsylvania's statutory program to reimburse nonpublic sectarian schools (hereafter schools) for secular educational services, the District Court on remand enjoined any payments under the program for services rendered after *Lemon I*, but permitted Pennsylvania to reimburse the schools for services performed prior to that decision. Appellants challenge the scope of this decree. *Held:* The judgment is affirmed. Pp. 1–16.

THE CHIEF JUSTICE, in an opinion joined by MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concluded that: The District Court did not abuse its discretion in permitting Pennsylvania to reimburse the schools for services rendered and costs incurred in reliance on the statutory scheme prior to its invalidation in *Lemon I*. Pp. 5–16.

(a) An unconstitutional statute is not absolutely void, but is a practical reality upon which people rely. Courts recognize that reality. Pp. 5–7.

(b) A trial court has wide latitude in shaping an equitable decree and reaching an accommodation between public and private needs. Pp. 7–8.

(c) The contested reimbursement will not contravene the constitutional principle of *Lemon I* of avoiding the ongoing entanglement of church and state, since only a final, ministerial post-audit is involved and no further detailed state surveillance of the schools is required. At the same time, however, supervision already conducted by Pennsylvania officials insures that the proposed reimbursement will not be used for sectarian purposes. The proposed

payment reflects only the schools' expenses incurred in expectation of reimbursement. Pp. 9–10.

(d) The schools relied in good faith on the state statute, which invited the contracts and authorized reimbursement for past services; and appellants, in self-styled "sensible recognition of the practical realities of the situation," may well have encouraged such reliance by the schools by not moving to have the payments enjoined before the contract services had been performed. Pp. 11–13.

(e) The schools could not have anticipated the *Lemon I* holding, which involved resolution of an issue of first impression that "was not clearly foreshadowed." Pp. 13–14.

(f) A State and those with whom it deals are not to be subjected to harsh, retrospective relief merely because they act on the basis of presumptively valid legislation, in the absence of contrary judicial direction. Pp. 15–16.

MR. JUSTICE WHITE concurred in the judgment.

348 F. Supp. 300, affirmed.

BURGER, C. J., announced the judgment of the Court and an opinion in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., concurred in the judgment. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined. MARSHALL, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 71–1470

Alton J. Lemon et al., Appellants, v. David H. Kurtzman, Etc., et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[April 2, 1973]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

On June 28, 1971, we held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. The case was remanded to the Three-Judge District Court for further proceedings consistent with our opinion. *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) (*Lemon I*). On remand, the District Court entered summary judgment in favor of appellants and enjoined payment, under Act 109, of any state funds to nonpublic sectarian schools for educational services performed after June 28, 1971. The District Court's order permitted the State to reimburse nonpublic schools for services provided before our decision in *Lemon I*. Appellants made no claim that appellees refund all sums paid under the Pennsylvania statute[1] struck down in *Lemon I*.

[1] Non-public Elementary and Secondary Education Act, 109 (24 P. S. §§ 5601–5609).

Appellants, the successful plaintiffs of *Lemon I*, now challenge the limited scope of the District Court's injunction. Specifically, they assert that the District Court erred in refusing to enjoin payment of some $24 million set aside by Pennsylvania to compensate nonpublic sectarian schools for educational services rendered by them during the 1970–1971 school year. We noted probable jurisdiction, 406 U. S. 943 (1972), and we affirm the judgment of the District Court.

(1)

The specifics of the Pennsylvania statutory scheme held unconstitutional in *Lemon I* need be recalled only briefly. Under Act 109, the participating nonpublic schools of Pennsylvania were to be reimbursed by the State for certain educational services provided by the schools pursuant to purchase-of-service contracts with the State. According to the terms of the contracts, the schools were to provide teachers, textbooks, and instructional materials for mathematics, modern foreign language, physical science, and physical education courses—"secular" courses of instruction. The State was not only to compensate the schools for the services provided, but also to undertake continuing surveillance of the instructional programs to insure that the services purchased were not provided in connection with "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." See *Lemon I*, *supra*, at 609–610.

Under § 5607 of the Act, any nonpublic school seeking reimbursement was to "maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational services, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement." To this end, the school accounts were to be subject to audit by the

State Auditor General. Actual payment was to be made by the Superintendent of Public Instruction "in four equal installments payable on the first day of September, December, March, and June of the school term *following* the school term in which the secular educational service was rendered." (Emphasis supplied.)

In *Lemon I*, we held that, although Act 109 had a secular legislative purpose, the Act fostered "excessive entanglement" of church schools and State through the requirement of ongoing state scrutiny of the educational programs of sectarian schools, the statutory post audit procedures, and potential involvement in the political process. We found it unecessary to decide whether Act 109 was constitutionally infirm on the additional ground that the "primary effect" of any state payments to church related schools would be to promote the cause of religion in contravention of the Establishment Clause of the First Amendment.

(2)

Against this backdrop we turn to the events relevant to this appeal. On June 19, 1968, Act. 109 became law. Approximately one month later, appellants publicly declared their intention of challenging the constitutionality of the new legislation. During the following six months, the State took steps to implement the Act, promulgating regulations and, in January of 1969, entering for the first time into service contracts for the 1968–1969 school year (then in progress) with approximately 1,181 nonpublic schools thoroughout Pennsylvania. The schools submitted schedules in June of 1969, at the conclusion of the 1968–1969 school year, specifying the precise items of expense during that year for which they would seek reimbursement, to be made during the 1969–1970 school year. On June 3, 1969, appellants filed their complaint, asking that Act 109 be declared unconstitutional and its enforcement enjoined.

Simultaneously with their 1969 complaint, appellants filed a motion for a preliminary injunction, to restrain the responsible state officials from "paying or processing for paying any funds pursuant to [Act 109]." However, appellants abandoned the request for preliminary relief in a letter of August 28, 1969, from their counsel to Judge Troutman. Appellants, describing their position as a "sensible recognition of the practical realities of the situation," . . . "withdrew from any attempt to prevent initial payment to the nonpublic schools scheduled for September 2 [1969]." In the same letter, appellants' counsel mentioned the payments scheduled for December 2, 1969, but in fact no attempt was ever made to enjoin those reimbursements.

On November 29, 1969, a divided District Court granted appellees' motion to dismiss appellants' complaint for failure to state a claim on which relief could be granted. Appellants filed a notice of appeal to this Court on December 17, 1969; at no time before or after probable jurisdiction was noted on April 20, 1970, did appellants move for interlocutory relief pending appeal, even though on January 15, 1970, the schools entered into service contracts with the States for the 1969–1970 school year. Consequently the District Court had no occasion to consider the exercise of injunctive power *pendente lite*.

In September of 1970, the schools began performing services for the 1970–1971 school year, compensable under the terms of Act 109; and on January 15, 1971, contracts were entered into for that school year. On June 28, 1971, we held Act 109 unconstitutional and remanded the cause to the District Court for further proceedings consistent with our opinion. Not until appellants filed their motion for summary judgment, in August 1971, did they first indicate their intention to prevent reimbursement

under Act 109 for the services already provided by the schools during the 1970–1971 school year.

(3)

Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years. Most often, we have been called upon to decide whether a decision defining new constitutional rights of a defendant in a criminal case should be applied to convictions of others that predated the new constitutional development. *E. g., Robinson* v. *Neil*, — U. S. — (Jan. 16, 1973); *Adams* v. *Illinois*, 405 U. S. 278 (1972); *Desist* v. *United States*, 394 U. S. 244 (1969); *Stovall* v. *Denno*, 388 U. S. 293 (1967); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Tehan* v. *Shott*, 382 U. S. 406 (1966); *Linkletter* v. *Walker*, 381 U. S. 618 (1965). But "in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968); *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964); *England* v. *State Board of Medical Examiners*, 375 U. S. 411 (1964). We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional, *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), and *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); or to the validity of elections for local officials held under possibly discriminatory voting laws, *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969). In each of these cases, the common request is that we reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a differ-

ent understanding of the controlling judge-made law than the rule that ultimately prevails.

Appellants urge, as they did in the District Court, a strange amalgam of flexibility and absolutism. Appellants assure us that they do not seek to require the schools to disgorge prior payments received under Act 109; in the same breath, appellants insist that the presently disputed payment be enjoined because an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U. S. 425 (1886). Conceding that we have receded from *Norton* in a host of criminal decisions and in other recent constitutional decisions relating to municipal bonds, appellants nevertheless view those precedents as departures from the established norm of *Norton*. We disagree.

The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those that have engaged the attention of courts, state and federal. . . ." *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940). Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and of 'public policy in the light of the nature both of the statute and its previous applications.'" *Linkletter*, *supra*, at 626–627, quoting from *Chicot County Drainage Dist.*, *supra*, at 374. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules

of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity. Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none.

In *Linkletter*, the Court suggested a test, often repeated since, embodying the recent balancing approach; we looked to "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Those guidelines are helpful, see pp. 9–11, *infra*, but the problem of *Linkletter* and its progeny is not precisely the same as that now before us. Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of conviction obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. True, the temporal scope of the injunction has brought the parties back to this Court, and their dispute calls into play values not unlike those underlying *Linkletter* and its progeny. But however we state the issue, the fact remains that we are asked to reexamine the District Court's evaluation of the proper means of implementing an equitable decree. Cf. *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295 (1970); *id.*, at 296–297 (Harlan, J., concurring).

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Swann* v. *Charlotte-Mecklenburg, etc. Board of Education*, 402 U. S. 1, 15, 27 n. 10 (1971). Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is neces-

sary,[2] what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education* (II), 349 U. S. 294, 300 (1955). MR. JUSTICE DOUGLAS, speaking for the Court, has said,

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distiguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944).

See also *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946).

In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots.

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[2] In *Linkletter*, *supra*, the Court recalled Mr. Justice Cardozo's statement that "the federal Constitution has no voice upon the subject." 381 U. S., at 629, citing *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). In *Sunburst*, the Court refused to accept the petitioner's contention that "[a]dherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is . . . a denial of due process when coupled with the declaration of intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future." Instead, the Court held that

> "A state, in defining the limits of adherence to precedent, may make a choice for itself between the principle of forward operation and that of relation backward." *Ibid.*

Sunburst does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court.

(4)

The constitutional fulcrum of *Lemon I* was the excessive entanglement of church and state fostered by Act 109. We found it unnecessary to decide whether Act 109's "legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses." 403 U. S., at 613–614. For, as we said of both Act 109 and the similar Rhode Island provision, "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U. S., at 619. We further emphasized the reciprocal threat to First Amendment interests from enmeshing the divisive issue of direct aid to religious schools in the traditional political processes. *Id.*, at 622–624.

The sensitive values of the Religion Clauses do not readily lend themselves to quantification, but despite the inescapable imprecision we think it clear that the proposed distribution of state funds to Pennsylvania's nonpublic schools will not substantially undermine the constitutional interests at stake in *Lemon I*. Act 109 required the Superintendent of Public Instruction to ensure that educational services to be reimbursed by the State were kept free of religious influences. Under the Act, the Superintendent's supervisory task was to have been completed long ago, during the 1970–1971 school year itself; nothing in the record suggests that the Superintendent did not faithfully execute his duties according to law. Hence, payment of the present disputed sums will compel no further state oversight of the instructional processes of sectarian schools. By the same token, since the constitutionality of Act 109 is now settled, there is no further potential for divisive political conflict among the citizens and legislators of Pennsylvania over the desirability or

degree of direct state aid to sectarian schools under Act 109.

Two problems having constitutional overtones remain, but their resolution requires no compromise of the basic principles of *Lemon I*. There is, first, the impact of the single and final post-audit. The record indicates that the post-audit process will involve only a ministerial "cleanup" function, that of balancing expenditures and receipts in the closing accounting—undertaken only once, and in that setting a minimal contact of the State with the affairs of the schools. Second, there is the question of impinging on the Religion Clauses from the fact of *any* payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in *Lemon I*. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes.[3] Finally, as will appear, even this single proposed

[3] See *Lemon I, supra:*

"If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension." 403 U. S., at 640 (concurring opinion of DOUGLAS, J.).

"The Court thus creates an insoluble paradox for the State and the parochial schools. The state cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces

payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.

Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools.[4] It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy. *City of Phoenix* v. *Kolodziejski, supra; Cipriano* v. *City of Houma; Allen* v. *Bd. of Elections, supra.* That there was such reliance by the schools is reflected by a well supported District Court finding. The District Court found that there was no dispute "that to deny the church-related schools any reimbursement for their services rendered would impose upon them a substantial hardship which would be difficult for them to meet." [5]

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it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." *Id.*, at 601 (dissenting opinion of WHITE, J.).

Here, the "insoluble paradox" is avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into our present evaluation of the constitutional interests at stake in the proposed payment.

[4] We agree with the District Court that whether the payments in question constitute payments under valid contracts or a subsidy "makes no difference in our decision." To characterise the payments as subsidies does not "lessen the reliance of the nonpublic schools on the payments or the subsequent hardship upon them if the payments are not made."

[5] The District Court's comment in turn reflects the following colloquy between that court and counsel for appellants, at the December 15, 1971 hearing after remand from this Court:

"MR. SAWYER: I am perfectly willing to concede—and I think I must here; we have taken no evidence—that there was reliance.

The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. In June 1969, appellants initiated the litigation that culminated in *Lemon I*. Though initially appellants moved for a preliminary injunction, to block the September 1969 payment of funds for services rendered during the 1968–1969 school year, for reasons of their own appellants withdrew the request. Funds were paid in September and December of 1969, and in March and June of 1970. In 1970, the State entered into new contracts with the nonpublic schools; appellants took no steps to block the making of these contracts or to prevent the State from disbursing funds, in September and December of 1970, March and June of 1971, for services rendered during the 1969–1970 school year. Appellants, meanwhile, had filed a notice of appeal to this Court by the time the distribution of funds for the 1969–1970 school year began. It was only after our decision in *Lemon I*—six months after the contracts for the 1970–1971 school year were perfected and after all services under those contracts had been performed—that appellants asserted their intention to block

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And I would like to state, so there is no question about that, that I am assuming there was reliance. I think as a practical matter, however, the schools continued to do what they were doing before.

"JUDGE HASTIE: Reliance in the sense, I assume, of determining activities and expenditures in anticipation that this amount would be reimbursed?

"MR. SAWYER: I know of a school that escrowed it, but I would think that would be rare. And I have to live with that, I think, unless I want to be prepared to go ahead and ask to take testimony and try to prove that wasn't so. . . ."

the payments due beginning in the fall of 1971. Thus for nearly two years, the State and the schools proceeded to act on the assumption that appellants would continue to adhere to a "sensible recognition of the practical realities of the situation."

There has been no demonstration by the appellee schools of the precise amount of any detriment incurred by them during the 1970–1971 school year in the expectation of reimbursement by the State. The complexity of such a determination for each of Pennsylvania's 1,181 nonpublic schools that contracted with the State under Act 109 is readily apparent.[6] But we need not dwell on the matter of uncertainty. On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude no more was needed to demonstrate retrospectively the degree of their reliance.

It is argued, though, that the schools were foolhardy to rely on any reimbursement by the State whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in *Lemon I* "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson, supra,* 404 U. S., at 106. A three-judge district court, with one dissent, upheld Act

[6] As to each school, the determination of actual reliance would be subtle, premised largely on credibility and not on facts of record. Nonreliance could not be assumed simply because expenditure levels remained constant before and after Act 109; any school might well assert that it would have reduced its educational expenditures in some particular but for the expectation of compensation for certain other expenditures incurred in connection with Act 109. Similarly, the inquiry could not be limited to expenditures for those items specified by the Act. Increased expenditures for any of the gamut of a school's activities might have been incurred in reliance on reimbursement for services covered by Act 109.

109. Soon after, another three-judge district court in Rhode Island held unconstitutional the Rhode Island statutory scheme we considered together with Pennsylvania's program in *Lemon I*. Nor were district courts alone in disagreement over the constitutionality of *Lemon*-style plans to provide financial assistance to sectarian schools. This Court was itself divided when the issue was ultimately resolved after full briefing and argument. And the Court acknowledged "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon I, supra*, 403 U. S., at 612.[7]

That there would be constitutional attack on Act 109 was plain from the outset. But this is not a case where it could be said that appellees acted in bad faith or that they relied on a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of *Lemon I* could be predicted with assurance sufficient to undermine appellees' reliance on Act 109.

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[7] According to the dissent, appellees can "tender no considerations of equity" because they had "clear warning" that they were "treading on unconstitutional ground." The apparent premise for this assertion is the view that the Establishment Clause forbids any and all use of tax moneys to "support" or to "subsidize" sectarian schools. Yet the Court's decisions, prior to and at the time of *Lemon I*, shied away from this sweeping application of the Establishment Clause, favoring instead particularized analysis of state involvement in religious schools, with the analysis based upon the facts and circumstances before us. *Tilton* v. *Richardson*, 403 U. S. 672 (1971); *Walz* v. *Tax Commission*, 397 U. S. 664, 669 (1970); *Board of Education* v. *Allen*, 392 U. S. 236, 242–243 (1968); *Everson* v. *Board of Education*, 330 U. S. 1, 14 (1947). There is, then, no basis for the dissent's suggestion that the Court has been "unequivocal" in proscribing all state assistance to religious schools.

(5)

In the end, then, appellants' position comes down to this: that any reliance whatever by the schools was unjustified because Act 109 was an "untested" state statute whose validity had never been authoritatively determined. The short answer to this argument is that governments must act if they are to fulfill their high responsibilities. As one scholar has observed, the diverse state governments were preserved by the framers "as separate sources of authority and organs of government—a point on which they hardly had a choice." H. Wechsler, Principles, Politics, and Fundamental Law 50 (1961).

Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective relief should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers—the officers of Pennsylvania—have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in post hoc evaluation of such political judgment, founded as it is on "one of the first principles of constitutional adjudica-

tion—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School Dist.* v. *Rodriguez*, — U. S. — (1973) (STEWART, J., concurring).

Federalism suggests that federal court intervention in state judicial processes be appropriately confined. See *Younger* v. *Harris*, 401 U. S. 37 (1971), and companion cases. Likewise, federalism requires that federal injunctions unrelated to state courts be shaped with concern and care for the responsibilities of the executive and legislative branches of state governments.* In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.

Affirmed.

MR. JUSTICE WHITE concurs in the judgment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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*This is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers to proceed with their business regardless of serious constitutional questions concerning state legislation. Indeed, a significant purpose of these tools is to preserve rights of all parties and to confine unnecessary harm during the often protracted pendency of constitutional litigation.

SUPREME COURT OF THE UNITED STATES

No. 71-1470

Alton J. Lemon et al., Appellants, v. David H. Kurtzman, Etc., et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[April 2, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involves last year, the current year, or next year. Madison in his Remonstrance stated "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment . . . ."[1]

Whether the grant is for teaching last year or at the present time taxpayers are forced to contribute to sectarian schools a part of their tax dollars.

The ban on that practice is not new. *Lemon I*, 403 U. S. 602, did not announce a change in the law. We had announced over and again that the use of taxpayers' money to support parochial schools violates the First Amendment, made applicable to the States by virtue of the Fourteenth.

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[1] Memorial and Remonstrance Against Religious Assessments, 2 The Writings of James Madison 183, — (G. Hunt ed. 1901). The Remonstrance is reprinted in *Everson* v. *Board of Education*, 330 U. S. 1, 63 (Rutledge, J., dissenting), and in *Walz* v. *Tax Commission*, 397 U. S. 664, 719 (DOUGLAS, J., dissenting).

We said in unequivocal words in *Everson* v. *Board of Education*, 330 U. S. 1, 16–17. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We reiterated the same idea in *Zorach* v. *Clauson*, 343 U. S. 306, 314, and in *McGowan* v. *Maryland*, 366 U. S. 420, 443, and in *Torcaso* v. *Watkins*, 367 U. S. 488, 493. We repeated the same idea in *McCollum* v. *Board of Education*, 333 U. S. 203, 210, and added that a State's tax-supported public schools could not be used "for the dissemination of religious doctrines" nor could a State provide the church "pupils for their religious classes through use of the States' compulsory public school machinery." *Id.*, at 212.

MR. JUSTICE BRENNAN in his separate opinion in *Lemon I* put the matter succinctly when he said,

> "[F]or more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions." 403 U. S. 642, 648–649.

So there was clear warning that those who proposed such subsidies were treading on unconstitutional ground. They can tender no considerations of equity that should allow them to profit from their unconstitutional venture.

The issues presented in this type of case are often caught up in political strategies, designed to turn judicial or legislative minorities into majorities. Lawyers planning trial strategies are familiar with those tactics. But those who use them and lose have no equities that make constitutional what has long been declared to be unconstitutional. From the days of Madison the issue

of subsidy has never been a question of the amount of the subsidy but rather a principle of no subsidy at all.

The problem of retroactivity involved in criminal cases is therefore inapplicable. There the question is whether the newly announced rule goes to the fairness of the trial that had been completed under the old rule. See *Johnson* v. *New Jersey*, 384 U. S. 719, 726–729. Here there is no new rule supplanting an old rule. The rule of no subsidy has been the dominant one since the days of Madison. We deal with the normal situation that governs judicial decisions. Normally they determine legal rights and obligations with respect to events that have already transpired. By definition courts decide disputes that have already arisen. A losing litigant has no equity in the fact that he "relied" on advice that turned out to be unreliable or wrong.[2] A decision overruling a prior authority may at times deny a litigant due process if applied retroactively. See *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673. Only a compelling circumstance has been held to limit a judicial ruling to prospective applications. The disruptive effect in criminal law enforcement is one example. *Stovall* v. *Denno*, 388 U. S. 293, 300. Likewise a ruling on the legality of municipal bonds has been given only prospective application where many prior bonds had been issued in good faith on a contrary assumption. *Phoenix* v. *Kolodziejski*, 399 U. S. 204, 213–215.

Retroactivity of the decision in *Lemon I* goes to the very core of the integrity of the judicial process. Constitutional principles do not ride on the effervescent argu-

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[2] The rule of *Bruton* v. *United States*, 391 U. S. 123, which rejected *Delli Paoli* v. *United States*, 352 U. S. 232, was given retrospective effect. We said, "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." *Roberts* v. *Russell*, 392 U. S. 293, 295.

ments advanced by those seeking to obtain unconstitutional subsidies. The happenstance of litigation is no criterion for dispensing these unconstitutional subsidies. No matter the words used for the apologia, the subsidy today given to sectarian schools out of taxpayers' monies exceeds by far the "three pence" which Madison condemned in his Remonstrance.

I would reverse the judgment below and adhere to the constitutional principle announced in *Lemon I*.